



**The AIRE Centre**  
Advice on Individual Rights in Europe

# **Towards a More Effective National Implementation of the European Convention on Human Rights**

**Guide to Key Convention Principles and Concepts  
and Their Use in Domestic Courts**

Towards a More Effective National  
Implementation of the European Convention  
on Human Rights – a Guide to Key Convention  
Principles and Concepts and Their Use in  
Domestic Courts

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# Introduction

**T**he European Convention on Human Rights (the Convention) was drafted in 1950. The Convention was born of its time, in the immediate aftermath of the Second World War. It draws on the bitter lesson learnt in all wars, and in that war most of all – that human conflict can only be avoided if human relations are based on equality and dignity, and that States can only hope to be stable in the long term if they respect the equality and dignity of their communities and their people.

65 years on, the importance of the fundamental set of rights and freedoms guaranteed by the Convention still holds true. However, in order for the Convention to provide its safeguards to all, consistent implementation is paramount – especially as the 47 States Parties to the Convention have different legal systems and implementation methods. The first route, for all people, to take to enforce their Convention rights is through the national courts. National courts are often better placed to assess whether a violation of a Convention right has occurred – in light of the evidence it hears directly, and its knowledge of the domestic law, and the cultural, and socio-economic contexts of the particular Member State. The role of the European Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation in how to apply and implement the Convention, depending on the circumstances of the case and the specific rights and freedoms engaged.

Achieving a better standard of Convention implementation at national level has been a continued priority and point of debate in recent years. This discussion was first initiated at a conference in Interlaken in 2010, and has been followed by the 2012 Brighton Declaration, the 2015 Brussels Declaration and the recently presented draft Copenhagen Declaration.

However, the effective national implementation of the Convention depends on a general knowledge and understanding of Convention rights and familiarity with the Court's jurisprudence. National judges are only able to give effect to the protected rights at national level if they are familiar with and understand the case law of the Court. And so it was that at the fourth Regional Rule of Law Forum held in Tirana in 2017, the idea of creating a handbook or guide on applying Convention case law in domestic judgments, was put forward.

The Regional Rule of Law Forum is held annually by the AIRE Centre and Civil Rights Defenders, and is a meeting place for current and former judges from

the Strasbourg Court, representatives of the most senior courts and judicial councils from throughout the region, directors of judicial training institutes, Government agents to the Strasbourg Court, legal experts and representatives of the NGO community. The Forum was established in 2014 after a dialogue with two judges of the European Court of Human Rights in Strasbourg, who were discussing their caseload in Strasbourg at the time, and both recognised many common challenges facing the countries in the region when it came to the proper application of the Convention. So the idea of holding the Forums was born out of the realisation that by encouraging and facilitating regional cooperation and dialogue, best practices and lessons could be shared: something that is both needed and desirable in order to overcome common challenges.

To create this guide was a natural extension of the discussions held at and conclusions emanating from the Forums. We gather participants from South East Europe, so it is the particular challenges that they are facing when implementing Convention that we aim to address in this publication.

The guide has four sections covering (i) a short introduction to and overview of the ECHR, (ii) key concepts of the ECHR, (iii) a look at the system for taking cases to the ECtHR and an application's path through the Strasbourg system, and finally (iv) a more in depth consideration of the principles and guidelines for applying ECtHR case-law in domestic decision-making. It is our hope that the publication will complement other thematic publications on the Articles and case law of the ECHR.

We are looking forward to developing this guide further in cooperation with courts and judicial training institutes in the region, and will consult widely on how it can best be expanded, with the possibility of creating further practical tools for judges and other authorities.

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# List of Acronyms and Abbreviations

<b>BCMS</b>	Bosnian/Croatian/Montenegrin/Serbian
<b>European Commission</b>	The European Commission of Human Rights (replaced by the European Court of Human Rights)
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>HUDOC</b>	Official database of the European Court of Human Rights
<b>Human Rights Committee</b>	United Nations Human Rights Committee
<b>ILO</b>	International Labour Organisation
<b>Strasbourg Court</b>	European Court of Human Rights
<b>Venice Commission</b>	European Commission for Democracy through Law

Note: “the Court” with a capital first letter is used to denote the European Court of Human Rights; where a reference to domestic courts is made, “the court” is written with a lower-case first letter.





# Chapter 1

## Short introduction to and overview of the ECHR

### I. Genesis and reform

The European Convention on Human Rights was signed<sup>1</sup> in Rome on 4 November 1950, in the aftermath of WWII, and entered into force on 3 September 1953. It is the first and maybe the most important Convention of the Council of Europe, an international organisation currently consisting of 47 member States (28 of these States are at the time of writing also members of the European Union) that was created with the aim to unify its members after the war. Accordingly, the Convention was conceived as a response to the atrocities committed during WWII; a document providing a much needed framework for the protection of fundamental rights and freedoms on an international level. It has been innovatory in the field of international law, in that it recognised a genuine right of individuals to take legal action at international level when all domestic remedies have failed.<sup>2</sup>

Since its entry into force, several Protocols have been adopted, not all of which have, however, been ratified by all Contracting States. Some of these introduced additional rights, whereas some concerned procedural issues. Two major reforms of the system have been realised, both of which aimed to address the increasing caseload of the Court: (i) adopted in 1994, **Protocol No. 11** most notably established a new single Court that replaced the initially formed part-time Court and the European Commission of Human Rights. The Commission's decisions form part of the Court's case law and are still valid today unless subsequent case law has amended their findings; (ii) in 2009, **Protocol No. 14** was adopted as a way to introduce further urgent procedural

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- 1 The Convention was initially signed by 12 - out of the 15 in total - States that were members of the Council of Europe at the time. Signature and ratification of the Convention is a prerequisite for joining the Council of Europe; all its current members have signed and ratified it.
  - 2 It should be noted that for many years the right of individual "petition" (with Protocol 11 the term "petition" turned to "application") was optional: the Court's jurisdiction to examine complaints by individuals or non-governmental organisations was subject to the condition that the State concerned had declared that it accepted such jurisdiction. Since Protocol 11, the jurisdiction of the Court, as provided in Article 34 of the Convention, has become mandatory (see Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, para. 85).

changes. These pertained more “to the functioning than the structure of the Court”<sup>3</sup> and were aimed at reducing the time spent by the Court on unmeritorious or repetitive applications so that it concentrates on the most important cases that require in-depth examination<sup>4,5</sup>.

At present, a further two Protocols have been adopted and await entry into force: **Protocol No. 15**, which, inter alia, introduces an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation<sup>6</sup> in the preamble to the Convention as well as some changes regarding the admissibility criteria<sup>7</sup>; and **Protocol No. 16**, the so-called “Dialogue Protocol”<sup>8</sup>, which aims to facilitate the dialogue between the ECtHR and the domestic courts via the medium of advisory opinions<sup>9</sup>.

## II. The nature of the rights guaranteed in the Convention

The Convention, including its Protocols, protects predominantly civil and political rights, placing less emphasis on economic, social or cultural rights<sup>10</sup>. The protection of property, the right to education, and the provision guaranteeing equality between spouses are the few exceptions of such rights protected directly via a relevant provision in the text of the Convention. Nonetheless, the Court has stressed that there is no water-tight division separating the sphere of social and economic rights from

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3 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, para. 35.

4 Id. paras. 35-37 and 79.

5 The main changes include the introduction of the single judge formation (Article 27), the expansion of the competences of the Committee of three judges (Article 28), a new admissibility criterion in Article 35(3) b, and the possibility to reach friendly settlements at any stage of the proceedings (Article 39).

6 See Chapter 2.V.

7 Shortening from six to four months the time limit within which an application must be made to the Court, and amending the ‘significant disadvantage’ admissibility criterion (see Chapter 3.II.i.).

8 Dean Spielmann, International conference “Application of the European Convention on Human Rights and fundamental freedoms on national level and the role of national judges”, 24-25 October 2014, Opening remarks.

9 See Chapter 3.II.ii.

10 Social and economic rights are mainly protected within the 1961 European Social Charter or the revised 1996 European Social Charter which is meant to gradually replace the 1961 Charter. Compliance with the rights set out in both Charters is subject to a supervisory and not a judiciary mechanism; a quasi-judicial system of collective complaints is, however, in place for the countries that have ratified the 1995 Additional Protocol to the European Social Charter. All countries of the Western Balkans that are members of the Council of Europe have ratified the 1996 European Social Charter but not the 1995 Additional Protocol. Certain cultural rights are being protected within separate treaties adopted by the member States of the Council of Europe (e.g. European Charter for Regional or Minority Language).

the field covered by the Convention, as many of the civil and political rights that it protects do have implications of a social or economic nature (*Airey v. Ireland*<sup>11</sup>).

The Court has thus developed a body of jurisprudence where it has accorded indirect protection to certain social and economic rights; it has done so via the interpretation of various Articles of the Convention and/or the recognition of certain positive obligations of the States. Examples of some aspects of such rights examined by the Court include: access to health care<sup>12</sup>, fair working conditions<sup>13</sup>, issues related to the right to housing<sup>14</sup>, the right to bargain collectively with the employer<sup>15</sup>, and the protection of social security contributions<sup>16,17</sup>.

Similarly, regarding cultural rights, the Court has gradually recognised substantive rights falling under this category, covering issues such as artistic expression, access to culture, cultural identity, linguistic rights, education, the protection of cultural and natural heritage, the right to seek historical truth and the right to academic freedom, particularly in light of an increasing number of cases brought before it by individuals or entities belonging to national minorities<sup>18</sup>.

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- 11 *Airey v. Ireland*, judgment of 9 October 1979, no. 6289/73, para. 26.
  - 12 See, for example, *Panaiteescu v. Romania*, judgment of 10 April 2012, no. 30909/06 (on the basis of Article 2) and *D. v. The United Kingdom*, judgment of 2 May 1997, no. 30240/96 (on the basis of Article 3).
  - 13 See, for example, *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01 and *Chowdury and Others v. Greece*, judgment of 30 March 2017, no. 21884/15 (on the basis of Article 4).
  - 14 See, for example, *Connors v. The United Kingdom*, judgment of 27 May 2004, no. 66746/01, paras. 81-95 regarding force evictions (on the basis of Article 8); *Fadeyeva v. Russia*, judgment of 9 June 2005, no. 55723/00, regarding exposure to unhealthy living conditions (on the basis of Article 8); *Cyprus v. Turkey*, [Grand Chamber] judgment of 10 May 2001, no. 25781/94, regarding the rights of displaced peoples (on the basis of Article 1 of Protocol 1); *Moldovan and Others v. Romania* (No. 2), judgment of 12 July 2005, nos. 41138/98 and 64320/01, in which case the applicants' living conditions and the racial discrimination to which they had been publicly subjected amounted, in the special circumstances of the case, to "degrading treatment" within the meaning of Article 3 (paras. 93-114). The Court also found a violation of Article 8 and of Article 14 taken in conjunction with Articles 6 and 8.
  - 15 See, for example, *Demir and Baykara v. Turkey*, judgment [Grand Chamber] of 12 November 2008, no. 34503/97, paras. 140-154 (light of the "right to form and to join trade unions" set forth in Article 11).
  - 16 See, for example, *Stec and Others v. The United Kingdom*, [Grand Chamber] decision of 6 July 2005, nos. 65731/01 and 65900/01, paras. 49-56, (on the basis of Article 1 of Protocol 1).
  - 17 For an extensive research on the indirect protection of social and economic rights through civil and political rights, see "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability", International Commission of Jurists, 2008.
  - 18 Research report "Cultural rights in the case-law of the European Court of Human Rights", Research division, Council of Europe/European Court of Human Rights, January 2011 (updated 17 January 2017), retrieved on 17

It should be noted that the protection of these rights and freedoms under the Convention system is meant to provide a minimum standard of protection and cannot be construed as limiting more extensive protection guaranteed by national law or other international agreements (Article 53)<sup>19</sup>.

### **III. Overview of the provisions of the Convention and the Protocols thereto**

The Convention consists of Article 1, and Sections I, II, and III. At present, six Protocols are annexed to the main text of the Convention providing for additional rights and freedoms. These are going to be presented along with the rights and freedoms guaranteed in Section I of the Convention; other than that, the present overview follows the order of the provisions in the Convention.

#### **Article 1**

Article 1 imposes a general obligation on States to secure the protection of the Convention rights and freedoms to anyone within their jurisdiction. This jurisdiction is primarily territorial: as a rule, the States are liable for events taking place on their territory; the Court has, however, recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a State outside its own territorial boundaries (see below where Section II of the Convention is discussed, namely the competence *ratione loci* of the Court). It is to be read along with Article 56, which gives the possibility to a State to declare that the Convention extends to all or any of the territories for whose international relations it is responsible. The primarily territorial nature of the jurisdiction, however, is not to be seen as contradictory to the States' liability for their sovereign acts outside their territory or their obligation to take into consideration certain consequences of actions or decisions taken in their own territory that unfold in the territory of another State (for example, in deportation proceedings consideration must be given to the fact that there is a real risk that an individual will be subjected to prohibited treatment if deported to another State).

Article 1 also provides the legal basis for the recognition of the States' positive obligations<sup>20</sup>, and it has played a central role in the evolution of the principle that the rights and freedoms set out in the Convention are practical and effective, not theoretical and illusory<sup>21</sup>.

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January 2017 from: [http://www.echr.coe.int/Documents/Research\\_report\\_cultural\\_rights\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf).

19 See Chapter 2.V.iii.

20 See Chapter 2.VII.

21 See Chapter 2VI.ii.

## **Section I: Rights and freedoms**

Section I of the Convention comprises **Articles 2-18**. Articles 2-14 enunciate the rights and freedoms guaranteed by the Convention, whereas Articles 15-18 set out some interpretative means for the understanding of the scope of these rights; further rights and freedoms are included in the annexed Protocols of the Convention.

### **The rights and freedoms guaranteed in Section I**

- Right to life (Article 2)
- Prohibition of torture (Article 3)
- Prohibition of slavery and forced labour (Article 4)
- Right to liberty and security (Article 5)
- Right to a fair trial (Article 6)
- No punishment without law (Article 7)
- Right to respect for private and family life (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- Right to marry (Article 12)
- Right to an effective remedy (Article 13)
- Prohibition of discrimination (Article 14)

### **Articles 15-18**

- Derogation in time of emergency (Article 15)
- Restrictions on political activity of aliens (Article 16)
- Prohibition of abuse of rights (Article 17)
- Limitation on use of restrictions on rights (Article 18)

### **The substantive rights and freedoms guaranteed in the annexed Protocols**

#### **Protocol 1**

- Protection of property (Article 1 Protocol 1)
- The right to education (Article 2 Protocol 1)
- The right to free elections (Article 3 Protocol 1)

#### **Protocol 4**

- Prohibition of imprisonment for debt (Article 1 Protocol 4)

- Freedom of movement (Article 2 Protocol 4)
- Prohibition of expulsion of nationals (Article 3 Protocol 4)
- Prohibition of collective expulsion of aliens (Article 4 Protocol 4)

#### **Protocol 6**

- Abolition of the Death Penalty (Article 1 Protocol 6)
- Death penalty in time of war (Article 2 Protocol 6)
- Prohibition of derogations (Article 3 Protocol 6)
- Prohibition of reservations (Article 4 Protocol 6)

#### **Protocol 7**

- Procedural safeguards relating to expulsion of aliens (Article 1 Protocol 7)
- Right of appeal in criminal matters (Article 2 Protocol 7)
- Compensation for wrongful conviction (Article 3 Protocol 7)
- Right not to be tried or punished twice (Article 4 Protocol 7)
- Equality between spouses (Article 5 Protocol 7)

#### **Protocol 12**

- General prohibition of discrimination (Article 1 Protocol 12)

#### **Protocol 13**

- Abolition of the death penalty (Article 1 Protocol 13)
- Prohibition of derogations (Article 2 Protocol 13)
- Prohibition of reservations (Article 3 Protocol 13)

### **Section II: The Court**

Section II of the Convention comprises **Articles 19-51**<sup>22</sup> which contain provisions regarding the purpose of the Court, its composition and structure, its jurisdiction and competence, its deliberation mechanisms and aspects of the procedure before it. This section is supplemented by the Rules of Court and the Practice Directions that are issued by the President of the Court to provide clarification on aspects of the Court's procedure<sup>23</sup>.

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22 The following grouping of these Articles serves analytical reasons only.

23 Available at: [http://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules#n1347877334990\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules#n1347877334990_pointer)

- **Article 19** sets out the Court's function, which is to ensure that the Contracting States abide by their obligations under the Convention and its Protocols. It is often invoked to indicate the boundaries of the role of the Court as opposed to the responsibilities of the States (Article 1),<sup>24</sup> and the role of the Committee of Ministers (Article 46)<sup>25</sup>.
- **Articles 20 - 31** concern the Court's composition, its supporting staff, and its organisation in different formations (plenary Court<sup>26</sup>, single judges, Committees of three judges, Chambers, and Grand Chamber), including the competence of each of these<sup>27</sup>.
- **Article 32 - 35** delineate the jurisdiction and competence of the Court as well as criteria regarding the admissibility of an application. The admissibility criteria are further considered in Chapter 3.<sup>28</sup>

Competence *ratione materiae*: the Court may examine applications regarding rights that are protected by the Convention and its Protocols. If a complaint concerns a situation that falls outside the scope of these rights, the application - in part or in its entirety - will be rejected as incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto. Also, complaints based on a provision in respect of which the respondent State has made a valid reservation under Article 57 will be rejected as incompatible *ratione materiae* – the validity of a State's reservation is assessed by the Court<sup>29</sup>.

Competence *ratione personae*: the alleged violation of the Convention must have been committed by a Contracting State or be in some way attributable to it. Also, the applicant must have standing according to Article 34 and be a "victim"<sup>30</sup> of the particular violation alleged.

Competence *ratione loci*: the Court shall only examine applications regarding complaints of actions that took (or will take) place within the jurisdiction of a Contracting State. Two situations give rise to exercise of jurisdiction by a State outside its own territorial boundaries and raise issues of State responsibility under the

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24 See Chapter 2.V.ii about the principle of subsidiarity.

25 See Chapter 3.III.ii.&iii.

26 "Plenary Court" means the European Court of Human Rights sitting in plenary session (Rule 1 of the Court).

27 See Chapter 3.II.i.

28 For an outline of the admissibility criteria see Chapter 3.II.i.

29 See the leading judgment *Belilos v. Switzerland*, judgment of 29 April 1988, no. 10328/83, paras. 50-60. For a recent recapitulation and application of the relevant principles see, for example, *Schädler-Eberle v. Liechtenstein*, judgment 18 July 2013, no. 56422/09, paras. 59-93.

30 For the autonomous concept of "victim" see Chapter 2.VI.i.



Convention: (i) circumstances of “State agent authority and control”, where the State, through its agents that operate outside its territory, exercises control and authority over an individual, and (ii) “effective control over an area”<sup>31</sup>.

Competence *ratione temporis*: the Court will not examine applications regarding complaints in relation to any act or fact which took place, or any situation which ceased to exist before the date of the entry into force of the Convention with respect to the respondent State (the “critical date”). The Court needs to identify, in each specific case, the exact time of the alleged interference, taking into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated (*Blečić v. Croatia*<sup>32</sup>). The Court may have regard to the facts prior to ratification inasmuch as they could be considered to have created a continuous situation extending beyond that date or may be relevant for the understanding of facts occurring after that date (e.g. *Kurić and Others v. Slovenia*<sup>33</sup>). The procedural obligations arising under Articles 2 and 3 in particular have been found to be “detachable” from the substantive aspects of these rights; thus, in cases where deaths or illegal treatment occurred before ratification, the State may have a distinct procedural obligation in relation to these acts (to conduct an effective investigation and institute appropriate proceedings) that arose after the critical date. Accordingly, the Court can assume temporal jurisdiction in such cases.<sup>34</sup>

- **Articles 36 - 40** concern procedural issues related to 3<sup>rd</sup> party interventions, the Court’s power to strike out applications, the examination of the case, friendly settlements, and the public character of the hearings and the documents submitted to the Registrar.

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31 See *Al-Skeini and Others v. the United Kingdom*, [Grand Chamber] judgment of 7 July 2011, no. 55721/07, paras. 130-150, where the Court examines its previous case-law regarding its jurisdiction under Article 1, clarifies the principles applicable on the matter and exemplifies the above two categories of exceptional circumstances.

32 *Blečić v. Croatia*, [Grand Chamber] judgment of 8 March 2006, no. 59532/00, para. 82.

33 See, for example, *Kurić and Others v. Slovenia*, [Grand Chamber] judgment of 26 June 2012, no. 26828/06, para. 240. The Court concluded that, although the erasure had happened before the Convention’s entry into force in respect of Slovenia, on that date the applicants were - as they continued to be - affected by the fact that their names were erased from the register.

34 See *Šilih v. Slovenia*, [Grand Chamber] judgment of 9 April 2009, no. 71463/01, paras. 139-167. The case concerned the procedural limb of Article 2 and established its “detachable” character. The Court set two criteria, stating that the Court’s temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to the critical date and that there must “exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State (paras. 162-163). These criteria were later clarified in the case of *Janowiec and Others v. Russia*, [Grand Chamber] judgment of 21 October 2013, nos. 55508/07 and 29520/09, paras. 140-151.

- **Articles 41 - 49** concern remedies for the injured party (just satisfaction - Article 41), the decisional instruments of the Court (decisions, judgments and advisory opinions), including their content and the conditions under which Chambers' judgments become final, and the binding force and execution of final judgments (Article 46). All these issues are examined in Chapter 3.
- **Articles 50 - 51** relate to the Court's expenditure, borne by the Council of Europe, and the privileges and immunities to which the judges are entitled.

**Important note:** It is evident Section II of the Convention contains Articles concerning the function of the Court and certain procedural issues before it. However, some of these Articles do contain substantive rights that individuals may rely on. For example, the Court has held that under Article 34 the Contracting States have the obligation not to interfere with an individual's effective exercise of the right to submit and pursue a complaint before the Court (*Paladi v. Moldova*<sup>35</sup>). Also, the Court has held that it is competent to examine complaints related to the non-execution of a particular judgment where there are facts that give rise to a fresh violation (e.g. *Emre v. Switzerland (No 2)*<sup>36</sup>)<sup>37</sup>.

### Section III: Miscellaneous provisions

Section III of the Convention comprises **Articles 52-59** which contain miscellaneous provisions. These concern inquiries made by the Secretary General (Article 52), the relation of the Convention with other instruments that provide human rights protection (Article 53)<sup>38</sup>, non-interference with the powers of the Committee of Ministers as these are set out by the Statute of the Council of Europe (Article 54), the exclusion of other means of dispute settlement (Article 55), the Convention's territorial application (Article 56)<sup>39</sup>, States' reservations in terms of particular provisions (Article 57), the denunciation of the Convention (Article 58), and its signature and ratification (Article 59).

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35 *Paladi v. Moldova*, [Grand Chamber] judgment of 10 March 2009, no. 39806/05, para. 85.

36 *Emre v. Switzerland (No 2)*, judgment of 11 October 2011, no. 5056/10, para. 39, also citing *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No 2)*, [Grand Chamber] judgment of 30 June 2009, no. 32772/02, paras. 66-67.

37 See Chapter 3.III.iii about the role of the Court after deliverance of a final judgment.

38 See Chapter 2.V.iii.

39 See above under Article 1 and the competence *ratione loci*.

## Chapter 2

# Key European Convention concepts and principles

**T**his chapter is dedicated to the key concepts and principles that underpin the Convention and is intended to be used as a practical tool when reading and implementing the jurisprudence of the Court. Some of the key concepts are clear from the text of the Convention; others are not expressly articulated in the text, but have been read into it by the Court when applying the Convention.

Whilst some of the concepts may at first glance look familiar, the Strasbourg organs have also ruled that certain terms have an “autonomous” meaning under the Convention. These terms may therefore NOT have the same meaning as they do in national law.

This chapter is divided into 7 sections:

- Categories of rights
- Prohibition of discrimination
- The balancing of rights
- Proportionality
- The Convention’s relationship with national and international law
- Autonomous concepts
- Positive obligations

### I. CATEGORIES OF RIGHTS

The Convention embraces four broad classes of rights: absolute rights; substantially qualified rights; rights relating to the administration of justice; rights with inherent restrictions.

#### 1. Absolute rights

Infringements of these rights are not permitted in any circumstances. They include the right to life (**Article 2**), prohibition of torture (**Article 3**), prohibition of slavery and forced labour (**Article 4 § 1**), no punishment without law (**Article 7**),

abolition of the death penalty (**Article 1 of Protocol 6 and Article 1 of Protocol 13**)<sup>40</sup>, and the right not to be tried or punished twice (**Article 4 of Protocol 7**).

**Article 15** of the Convention permits derogations in time of emergency, but makes it clear that no derogation from Articles 2, 3, 4 § 1, 7, or from Article 1 of Protocol 6, Article 4 of Protocol 7 and Article 1 of Protocol 13 can be made under that provision.

**Article 2 § 1** (right to life) – following the coming into force of Protocol 6 in 1985 and Protocol 13 in 2003, abolishing the death penalty, this Article should now read as though the second sentence stopped at the word “intentionally”.

*Intentional* deprivation of life is not permitted in any circumstances.

In deciding whether the deprivation of life has met the criteria set out in Article 2 § 2, the Court has taken a very strict approach to the phrase “no more than absolutely necessary”, and has in particular been careful to examine what alternatives to the use of lethal force were available.

A violation of Article 2 may be found even when no death occurs (e.g. *Makaratzis v. Greece*<sup>41</sup>; *Saso Gorgiev v. Macedonia*<sup>42</sup>) or in cases of forced disappearance where the body has not been found. Disappearance cases may also trigger Article 5, as well as Article 3 as regards the impact of the disappearance on the relatives (e.g. *Taş v. Turkey*<sup>43</sup>).

**Article 3** (prohibition of torture and inhuman and degrading treatment or punishment) is short and simple. Any treatment which passes the very high “threshold of severity” test is prohibited<sup>44</sup>. Whether or not it reaches that threshold will depend on all the circumstances of the case (see inter alia *Muršić v. Croatia*<sup>45</sup>), such as the duration of the treatment, physical or mental effects, and the sex, age and state

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40 In contrast to Protocol 6, Protocol 13 prohibits death penalty even in time of war, but not all countries have ratified it; all Balkan countries have, however, ratified it.

41 *Makaratzis v. Greece*, [Grand Chamber] judgment of 20 December 2004, no. 50385/99, para. 49.

42 *Saso Gorgiev v. Macedonia*, judgment of 19 April 2012, no. 49382/06, para. 29.

43 *Taş v. Turkey*, judgment of 14 November 2000, no. 24396/94, paras. 79-80.

44 For an example of degrading treatment passing such test, see *Bouyid v. Belgium*, judgment [Grand Chamber] of 28 September 2015, no. 23380/09, paras. 86-88 and 100-113; the Court found that the administration of slaps by police officers to a person who is completely under their control constitutes a serious attack on their dignity and constitutes degrading treatment.

45 *Muršić v. Croatia*, [Grand Chamber] judgment of 20 October 2016, no. 7334/13, where the Court recapitulated the principles and standards for the assessment of whether insufficient personal space allocated to prisoners passes the “threshold of severity” test of Article 3 (paras. 96-141).

of health of the victim (*Ireland v. the United Kingdom*<sup>46</sup>), as well as the nature and context of the treatment or punishment, and the manner and method of its execution (*Soering v. the United Kingdom*<sup>47</sup>).

For political reasons - it appears more unacceptable to a State to be found guilty of torture than inhuman treatment - some of the case law has devoted considerable time and intellectual energy to deciding whether the treatment in question should be classified as torture or inhuman or degrading treatment or punishment<sup>48</sup>. But all are ***equally absolutely prohibited***, whether administered by state officials or private individuals, or in situations where an individual will be exposed to such treatment if sent to another jurisdiction in expulsion or extradition proceedings. The same applies to Article 2 when the death penalty will be imposed on an individual if sent to another jurisdiction in expulsion or extradition proceedings or where a real risk of deliberate killing exists against such individual.

Both Article 2 and Article 3 have inherent procedural safeguards as well as substantive elements and require that any police or military operation is prudently planned and any allegations of unlawful killing or treatment prohibited by Article 3, committed either by State officials or by private persons, are properly investigated. The investigation must be effective, that is, capable of establishing the facts and identifying and punishing those responsible. The investigation must be both prompt and thorough, which means that the authorities must act of their own motion once the matter has come to their attention and must always make a serious attempt to find out what happened, including taking all reasonable steps available to them to secure the relevant evidence. Furthermore, the investigation should be independent of the executive, whereas the victim should be able to participate effectively in the investigation in one form or another.<sup>49</sup>

In a series of cases concerning extraordinary renditions, the Court has acknowledged that an aspect of the procedural limb of Article 3 also concerns the right to the truth regarding the relevant circumstances of the case, which “does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened”<sup>50</sup>; this constitutes another reason why the State must undertake an adequate

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46 *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, para. 162.

47 *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88 para. 100.

48 For the meaning of each of these concepts see below section VI.i.

49 For a reiteration of the principles mentioned above, including references to the Court's case law, see, inter alia, *El-Masri v. Macedonia*, [Grand Chamber] judgment of 13 December 2012, no. 39630/09, paras. 182-185.

50 *Al Nashiri v. Poland*, judgment of 24 July 2014, no. 28761/11, para. 495.

investigation in order to prevent any appearance of impunity in respect of such acts (see *El-Masri v. Macedonia*<sup>51</sup>).

The principles regarding the requirement of an effective investigation that have been developed under Articles 2 and 3 also apply to other breaches of substantive rights, notably Articles 4, 5 and 8.

**Article 4** (prohibition of slavery and forced labour) has little case law. Only Article 4 § 1 (“No one shall be held in slavery or servitude”) is absolute.

Human trafficking and agricultural or domestic servitude fall within the scope of Article 4 (see *Siliadin v. France*<sup>52</sup>, as well as *Rantsev v. Cyprus and Russia*<sup>53</sup>, where the Court first clarified the States’ positive obligations under this Article while also taking into consideration the cross-border feature of trafficking cases<sup>54</sup>, and the related *M and others v. Italy and Bulgaria*<sup>55</sup>, where no violation of Article 4 was, however, found. See also, the judgment in *Chowdury and Others v. Greece*<sup>56</sup> regarding the rights of undocumented workers). As is the case with Articles 2 and 3, Article 4 also imposes a procedural obligation on the State to investigate any credible suspicion of a violation of this Article.

**Article 7** (no punishment without law) – Article 7 has been interpreted to guarantee that “where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant” (*Scoppola v. Italy* (No. 2)<sup>57</sup>).

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51 *El-Masri v. Macedonia*, [Grand Chamber] judgment of 13 December 2012, no. 39630/09, paras. 191-192.

52 *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01.

53 *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04.

54 The Court found that Cyprus had failed to put in place an appropriate legislative and administrative framework against trafficking (namely, the regime of artiste visas in Cyprus had not afforded to the trafficked person practical and effective protection) whereas the police had failed to protect the person from trafficking although the circumstances gave rise to a credible suspicion that she might have been trafficked or exploited. On its part, Russia, which was where the recruitment had occurred, had violated the procedural obligation under Article 4 to conduct an effective investigation into the person’s recruitment (id. paras. 290-309).

55 *M and others v. Italy and Bulgaria*, judgment of 31 July 2012, no. 40020/03

56 *Chowdury and Others v. Greece*, judgment of 30 March 2017, no. 21884/15.

57 *Scoppola v. Italy* (No. 2), [Grand Chamber] judgment of 17 September 2009, no. 10249/03, para. 109.

Although Article 7 is an absolute right, the Court has held that it does not preclude clarification and development through the common law, consistent with the essence of the offence and where the development of the law is reasonably foreseeable. The *locus classicus* was the jurisprudential criminalisation of rape in marriage (*S.W. v. the United Kingdom*<sup>58</sup>). The Court has used the same criteria that it uses when it needs to determine whether an interference with Articles 8-11 is sufficiently prescribed in law (see below).

## 2. Substantially qualified rights

These rights may be interfered with but only when there is a legitimate aim identified in the Articles and the interference is proportionate to that specific aim. These are: right to respect for family and private life, home and correspondence (**Article 8**), right to freedom of thought, conscience and religion (**Article 9**), freedom of expression (**Article 10**), freedom of assembly and association (**Article 11**).

In considering whether there has been a violation of these rights, the Strasbourg organs have asked the following questions:

1. Do the facts disclose an identified protected right as that right has been defined by the Court?
2. Has there been an interference with the protected right, or is such an interference proposed?
3. Was/is that interference prescribed by a law meeting the quality of law test?<sup>59</sup>
4. Did/would the interference pursue an identified legitimate aim? Here, check the aims permitted by each Convention Article.
5. Was the interference necessary in a democratic society as proportionate to the legitimate aim pursued? Or, will it be?<sup>60</sup>

If the answers to questions 1 and 2 are YES, but the answer to *any* (or a fortiori all) of questions 3, 4, 5 is NO, there will have been a violation.

## 3. Rights relating to the administration of justice

These are: the right to liberty and security (**Article 5**), the right to a fair trial (**Article 6**), no punishment without law (**Article 7**)<sup>61</sup>, the right of appeal in criminal

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58 *S.W. v. the United Kingdom*, judgment of 22 November 1995, no. 20166/92, paras. 36 and 41-43.

59 For the Convention meaning of the “quality of law” see below Section VI.ii.

60 For the principle of proportionality also see below in Section IV.

61 A brief comment on Article 7 has been included above in the section regarding absolute rights.

matters (**Article 2 of Protocol 7**), and the right not to be tried or punished twice (**Article 4 of Protocol 7**).

**Article 5** (right to liberty and security) - the key principle underlying this Article is the observance of the rule of law. The list of instances of lawful deprivation of liberty set out in Article 5 § 1 is exhaustive. Detention will be unlawful unless it is for one of the specified reasons and clearly authorised by an identifiable provision of national law.

**Article 5 § 4** affords the arrested or detained person the right to have the lawfulness of the deprivation of liberty reviewed speedily by a court that has the competence to order release if the detention is unlawful. The review does not extend to all aspects of the case but it should be wide enough to cover the procedural and substantive conditions that are essential for the “lawfulness”, in Convention terms, of the deprivation of liberty. This includes examining “compliance with the procedural requirements of domestic law as well the reasonableness of the suspicion underpinning the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention”<sup>62</sup>.

**Article 5 § 5** (compensation for victims of unlawful arrest or detention) and **Article 3 Protocol 7** (compensation for wrongful conviction) are the only places where the Convention stipulates that national law must provide compensation.

**Article 6** (right to a fair trial) - this right only applies to the determination of civil rights and/or criminal charges as those concepts have been elaborated on by the Court (see below at section VI.i.). It does not apply automatically to all court proceedings concerning other Convention rights. It includes the right of access to court and sets out the safeguards which will ensure a fair trial. The rights are not absolute. Access to court, for example, may be restricted by procedural bars or limitation periods. Any limitations must not, however, restrict or reduce a person’s access to such an extent that the very essence of the right is impaired (see, for example, *Marini v. Albania*<sup>63</sup>). The right to legal aid (as opposed to legal representation) is only guaranteed in both civil and criminal proceedings where the “interests of justice so require”. Denial of access to legal representation in criminal proceedings requires a much more

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62 For a recent reiteration of the principles regarding Article 5(4), see *Khlaifia and Others v. Italy*, [Grand Chamber] judgment of 15 December 2016, no. 16483/12, paras. 128-131.

63 *Marini v. Albania*, judgment of 18 December 2007, no. 3738/02, paras. 113 & 122. The Court held that the right to court includes the right to have a final determination on a matter submitted to a court (para. 120); the Constitutional Court’s failure to reach a majority on the proposals before it restricted the essence of the applicant’s right under Article 6(1).



stringent test (see *Ibrahim and Others v. the United Kingdom*<sup>64</sup>). Denial of access to a lawyer of the defendant's own choosing may also amount to a violation of the right to a fair hearing, when such restriction is made without "relevant and sufficient" reasons and affects the overall fairness of the proceedings (*Dvorski v. Croatia*<sup>65</sup>).

A word of warning must be given about Article 6 case law. Since - by definition - no complaint will be admissible in Strasbourg unless all domestic remedies have been exhausted, almost all cases alleging violations of Article 6 will have proceeded to the highest national courts before reaching Strasbourg. The Court will frequently find no violation of Article 6 because it considers that the proceedings "taken as a whole" were fair and that the higher court was able to rectify the errors of the lower courts. Judges sitting in lower courts may hence erroneously be persuaded that because a particular procedural defect was not found to be a violation of the Convention by the Strasbourg organs, it complies with Convention standards.

**Article 2 of Protocol 7** (right of appeal in criminal matters) - This guarantees a right to have a criminal conviction or sentence "reviewed" by a higher tribunal. The Article does not guarantee a right to an appeal on the merits of a judgment and the States have a wide margin of appreciation to determine how it is to be exercised - any limitations though must pursue a legitimate aim and not infringe the very essence of the right. The review may therefore concern both points of fact and points of law or be confined solely to points of law (*Krombach v. France*<sup>66</sup>). The term "tribunal" has the same autonomous meaning as in Article 6(1) (see below in section VI.i.).

**Article 4 of Protocol 7** (right not to be tried or punished twice) - The Article contains three distinct guarantees: no one shall be (i) liable to be tried, (ii) tried or (iii) punished in criminal proceedings for the same offence, irrespective of whether the proceedings have resulted in a conviction or acquittal. It applies to judgments that are final, that is, those that have acquired the force of *res judicata*.

For the determination of whether the proceedings in question can be regarded as "criminal" in the context of this Article, the Court applies *the three Engel criteria* previously developed for the purposes of Article 6 (see below in part VI.i. under the concept "criminal"). What constitutes a different "offence" is not to be determined by the legal characterisation of the offences in question; it would be the same offence in

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64 *Ibrahim and Others v. the United Kingdom*, [Grand Chamber] judgment of 13 September 2016, nos. 50541/08 and others, paras. 255-265, where the Court clarified the principles applicable to the test of the two stages assessment previously laid down in *Salduz v. Turkey*, [Grand Chamber] judgment of 27 November 2008, no. 36391/02.

65 *Dvorski v. Croatia*, [Grand Chamber] judgment of 20 October 2015, no. 25703/11, paras. 79-80.

66 *Krombach v. France*, judgment of 13 February 2001, no. 29731/96, para. 96.

so far as it arises from identical facts or facts which are substantially the same (see *Sergey Zolotukhin v. Russia*<sup>67</sup>, where the Court harmonised its previous approaches primarily on the matter of what constitutes *idem* in the *ne bis in idem* principle laid down in this Article<sup>68</sup>). In *A and B v. Norway*<sup>69</sup>, the Court examined its previous case law predominantly on the issue of what constitutes *bis* in the above principle, that is, on the question of whether the proceedings have been duplicated. It concluded that Article 4 of Protocol 7 does not preclude the conduct of parallel proceedings, which are aimed to address different aspects of the social problem involved (for example, imposition through administrative proceedings of tax penalties and criminal persecution for fraud because of tax evasion, which was the issue in this case). The respondent State must, however, demonstrate that the dual proceedings in question have been “sufficiently closely connected in substance and in time”, having been combined in a foreseeable and proportionate manner so as to form a coherent whole<sup>70</sup>.

Paragraph 2 of this Article provides for the possibility that a case is re-opened in accordance with domestic law following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings. In *Marguš v. Croatia*<sup>71</sup> the Court held that granting amnesty to a soldier for acts amounting to grave breaches of fundamental human rights amounted to a “fundamental defect” in the previous set of proceedings; Article 4 of Protocol 7 did not therefore apply in the specific circumstances of the case.

#### 4. Rights with inherent restrictions

These rights do not include a specific provision permitting interferences, as is found in the substantially qualified rights, but the Court has accepted that there is room for implied restrictions. These rights are: the right to marry (**Article 12**), right to peaceful enjoyment of possessions (**Article 1 of Protocol 1**), right to education (**Article 2 of Protocol 1**) and right to free elections (**Article 3 of Protocol 1**).

**Article 12** (right to marry) – the wording suggests that any interference is acceptable if it is prescribed by national law, but the Convention organs have held that it must not “impair the very essence of the right”. The scope of the right to marry is examined below in the section regarding the autonomous concepts (section VI).

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67 *Sergey Zolotukhin v. Russia*, [Grand Chamber] judgment of 10 February 2009, no. 14939/03.

68 *Id.* paras. 78-84.

69 *A and B v. Norway*, [Grand Chamber] judgment of 15 November 2016, nos. 24130/11 and 29758/11.

70 *Id.* paras. 130 – 134, where the Court explains the factors that determine whether the proceedings are sufficiently closely connected.

71 *Marguš v. Croatia*, [Grand Chamber] judgment of 27 May 2014, no. 4455/10, para. 124-141.

**Article 1 Protocol 1** (peaceful enjoyment of possessions<sup>72</sup>) - The Article comprises three distinct but connected rules (see, inter alia, *Sporrong and Lönneroth v. Sweden*<sup>73</sup>; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and Macedonia*<sup>74</sup>): the general principle of peaceful enjoyment of possessions and two rules concerning particular instances of interference with the right to peaceful enjoyment of property (deprivation of possessions and control on the use of property). The structure of the Article and the interconnection of its three rules have informed the Court's approach when examining a complaint under any of the rules of this Article (see for example *The Holy Monasteries v. Greece*<sup>75</sup>; *Broniowski v. Poland*<sup>76</sup>; *Chassagnou and Others v. France*<sup>77</sup>). Accordingly, any type of interference with the peaceful enjoyment of possessions needs to fulfil the following principles: (i) the principle of lawfulness – the interference must be provided for by “law” in the meaning of the Convention; (ii) the interference must pursue a legitimate aim “in the public interest” or “in the general interest”. The national authorities enjoy a wide margin of appreciation as they have direct knowledge of their society and its needs when implementing social and economic policies; as a result, the Court's examination is limited to reviewing whether the national authorities' judgment as to what is “in the public interest” has been manifestly without reasonable foundation. (iii) There must be a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's right to peacefully enjoy their possessions.

**Article 2 Protocol 1** (right to education) - This Article guarantees a right of access to educational institutions existing at a given time. It imposes on States the obligation to provide effective access to such establishments, which means, inter alia, that the individual who is the beneficiary should have the possibility of drawing profit from the education received (*Belgian linguistic case*<sup>78</sup>). Seen in conjunction with Article 14, there may be some positive obligations for the State (for example, in *Oršuš and Others v. Croatia*<sup>79</sup> the Court observed that a high drop-out rate of Roma pupils at a particular County in Croatia called for the implementation of positive measures). All

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72 See below in Section VI.i. about the concept of “possessions”.

73 *Sporrong and Lönneroth v. Sweden*, judgment of 23 September 1982, nos. 7151/75 and 7152/75, para. 61.

74 *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Macedonia*, judgment [Grand Chamber] of 16 July 2014, no. 60642/08, para. 98.

75 *The Holy Monasteries v. Greece*, judgment of 09 December 1994, nos. 13092/87 and 13984/88, para. 56.

76 *Broniowski v. Poland*, [Grand Chamber] judgment of 22 June 2004, no. 31443/96, para. 134.

77 *Chassagnou and Others v. France*, [Grand Chamber] judgment of 29 April 1999, nos. 25088/94, 28331/95 and 28443/95, para. 75.

78 *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, “*Belgian linguistic case*”, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

79 *Oršuš and Others v. Croatia*, [Grand Chamber] judgment of 16 March 2010, no. 15766/03, para. 177.

levels of education are covered but there is a wider margin of appreciation recognised as we move from primary to higher education (*Ponomaryovi v. Bulgaria*<sup>80</sup>).

**Article 3 Protocol 1** (right to free elections) - In determining compliance of a State's interference with this right, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. The Article contains an active aspect (right to vote) and a passive one (right to stand for election). The Court follows a stricter approach when it examines restrictions on the right to vote rather than on the right to stand for election where a wider margin of appreciation seems to be afforded to the States (*Zdanoka v. Latvia*<sup>81</sup>).

## II. PROHIBITION OF DISCRIMINATION

There is no freestanding prohibition on discrimination in the main body of the ECHR. **Article 14** (prohibition of discrimination) does not provide for a general prohibition, but only for a prohibition of discrimination in respect of the rights guaranteed in the Convention. The Court has in fact stated that it is as though Article 14 formed an integral part of each of the Articles laying down rights and freedoms (*Belgian Linguistic case*<sup>82</sup>). However there can be a violation of Article 14 even if there is no violation of the substantive right as long as the subject matter falls within the *ambit* of the substantive right (see for example *Kafkaris v. Cyprus*<sup>83</sup>; *Thlimmenos v. Greece*<sup>84</sup>; *Sejdic and Finci v. Bosnia and Herzegovina*<sup>85</sup>; and *Burden v. the United Kingdom*<sup>86</sup>).

**Article 1 of Protocol 12** provides a wider prohibition on discrimination in relation to any right “set forth in law”. It came into force in April 2005<sup>87</sup>. However, Protocol 12 still does not prohibit all forms of discrimination but only in relation to rights “set forth in [national] law”.

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80 *Ponomaryovi v. Bulgaria*, judgment of 21 June 2011, no. 5335/05, para. 56.

81 *Zdanoka v. Latvia*, [Grand Chamber] judgment of 16 March 2006, no. 58278/00, para. 115.

82 *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, “*Belgian linguistic case*”, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

83 *Kafkaris v. Cyprus*, [Grand Chamber] judgment of 12 February 2008, no. 21906/04, para. 159.

84 *Thlimmenos v. Greece*, [Grand Chamber] judgment of 6 April 2000, no. 34369/97, para. 40.

85 *Sejdic and Finci v. Bosnia and Herzegovina*, [Grand Chamber] judgment of 22 December 2009, nos. 27996/06 and 34836/06, para. 39.

86 *Burden v. the United Kingdom*, [Grand Chamber] judgment of 29 April 2008, no. 13378/05, para. 58.

87 In Montenegro, Protocol 12 came into force on 6 June 2006.

The Court follows the same definition of discrimination for both Articles: discrimination means treating differently persons in similar situations without an objective and reasonable justification. “No objective and reasonable justification” means that the differentiation in treatment does not pursue a legitimate aim or that it is not proportionate.

In determining whether or not Article 14 has been violated the Court asks:

1. Is there a difference in treatment? (like must be compared with like)
2. Is it based on the characteristic identified? (sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status)
3. Does it have a legitimate aim? (not every difference in treatment amounts to discrimination)
4. Is the difference in treatment proportionate?

The Court has not only found that like should be treated alike, but that discrimination occurs in situations where people who should be treated differently are treated the same without an objective and reasonable justification (e.g. *Thlimmenos v. Greece*<sup>88</sup>).

The Court has also considered that discrimination contrary to the Convention may result not only from a legislative measure, but also from a *de facto* situation resulting from a well-established practice (e.g. *Zarb Adami v. Malta*<sup>89</sup>).

A person can be a victim of discrimination on the basis of another persons’ protected status or characteristics (see, for example, *Škorjanec v. Croatia*<sup>90</sup>, where the applicant had been targeted as the partner of a man of Roma origin, and *Guberina v. Croatia*<sup>91</sup>, in which case the applicant had suffered less favourable treatment by the tax authorities on grounds relating to the disability of his child).

### III. THE BALANCING OF RIGHTS

Under Article 1, States are under a **positive obligation**, to provide effective protection for each individual’s right to life, to physical safety and to the peaceful enjoyment of his or her possessions, and to take all the steps that they could reasonably

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88 *Thlimmenos v. Greece*, [Grand Chamber] judgment of 6 April 2000, no. 34369/97, para. 44.

89 *Zarb Adami v. Malta*, judgment of 20 June 2006, no. 17209/02, para. 76.

90 *Škorjanec v. Croatia*, judgment of 28 March 2017, no. 25536/14, paras. 55-56.

91 *Guberina v. Croatia*, judgment of 22 March 2016, no. 23682/13, paras. 76-79.

be expected to take to prevent the occurrence of a harm of which they knew or ought to have known. If the harm has occurred, they have a duty to investigate it effectively, prosecute it correctly, and hold a fair trial which is capable of leading to a conviction if the accused is guilty.

This obligation dictates the balance that has to be achieved between the rights of victims and the rights of the accused in the good administration of justice, in particular criminal justice, which is regulated by **Articles 5 and 6**.

In many situations the balancing act that has to be carried out will be between the Convention rights of two or more potential human rights victims, as often occurs in family law or landlord-tenant disputes. Under Articles 8-11, it may be that the Convention right, e.g. right to privacy, or to a good reputation under Article 8, of one person has to be balanced against the Convention right to freedom of expression under Article 10 of another (e.g. *Von Hannover v. Germany (No. 2)*<sup>92</sup> and *Axel Springer AG v. Germany*<sup>93</sup>). Sometimes it is the interests of the community as a whole which have to be balanced against the rights of an individual - compulsory purchase orders are a classic example.

Where domestic courts have undertaken a balancing act between two rights in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to set aside the balancing done by them (e.g. *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*<sup>94</sup>).

**Articles 17 and 18** set out some general principles in this context.

**Article 17** is applicable only on an exceptional basis and in extreme cases (*Paksas v. Lithuania*<sup>95</sup>; *Perinçek v. Switzerland*<sup>96</sup>). The Article's general purpose, insofar as it refers to groups or to individuals, is to prevent those with totalitarian aims from taking advantage of the provisions of the Convention in order to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the

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92 See *Von Hannover v. Germany (No. 2)*, [Grand Chamber] judgment of 7 February 2012, nos. 40660/08 and 60641/08.

93 *Axel Springer AG v. Germany*, [Grand Chamber] judgment of 7 February 2012, no. 39954/08.

94 *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [Grand Chamber] judgment of 27 June 2017, no. 17224/11, para. 121, with reference to *Von Hannover v. Germany (No. 2)*, [Grand Chamber] judgment of 7 February 2012, nos. 40660/08 and 60641/08.

95 *Paksas v. Lithuania*, [Grand Chamber] judgment of 06 November 2011, no. 34932/04, paras. 87-88.

96 *Perinçek v. Switzerland*, [Grand Chamber] judgment of 15 October 2015, no. 27510/08, para. 114.

Convention (see *Lawless v. Ireland* (No. 3)<sup>97</sup>). As a result, Article 17 is applicable only to rights that allow a person to engage in such activities, such as Articles 9, 10 and 11. It cannot, therefore, be the basis for depriving a person of other fundamental rights, such as for example those guaranteed by Articles 5 and 6 (*Lawless v. Ireland* (No. 3)<sup>98</sup>).

Notable examples of cases examined under Article 17 include cases related to the rights of communist parties (*German Communist Party v. the Federal Republic of Germany*; *United Communist Party of Turkey and Others v. Turkey*<sup>99</sup>) and to potential limitations to the freedom of expression in cases concerning statements denying the Holocaust, justifying a pro-Nazi policy, alleging the prosecution of Poles by the Jewish minority and the existence of inequality between them, or linking all Muslims with a grave act of terrorism (*Pavel Ivanov v. Russia*<sup>100</sup> with references to such cases).

**Article 18** does not have an autonomous role and it can only be applied in conjunction with other Articles of the Convention. However, there can be a breach of Article 18 even if there is no breach of the Article in conjunction with which it applies. A central issue regarding the application of this Article relates to the difficulty in proving an improper aim behind the actions of an authority. The Court used to begin its assessment starting from the general assumption that the national authorities of the States have acted in good faith; the applicant was expected to convincingly rebut this assumption. As a result, there have not been many cases where a breach of that Article has been found (e.g. *Gusinskiy v. Russia*<sup>101</sup>; *Lutsenko v. Ukraine*<sup>102</sup>; *Tymoshenko v. Ukraine*<sup>103</sup>). However, the Court has recently revisited its case law in *Merabishvili v. Georgia*<sup>104</sup>, clarifying that there is no reason to restrict itself to direct proof in relation to complaints under Article 18 or to apply a special standard of proof to such allegations<sup>105</sup>. As a general rule, the burden of proof is not borne by one or the other party, and this approach also applies to complaints under Article 18<sup>106</sup>.

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97 *Lawless v. Ireland* (No. 3), judgment of 1 July 1961, no. 332/57, p. 18, para. 7.

98 *Ibid.*

99 *German Communist Party v. the Federal Republic of Germany*, decision of 20 July 1957, no. 250/57; *United Communist Party of Turkey and Others v. Turkey*, [Grand Chamber] judgment of 30 January 1998, no. 19392/92.

100 *Pavel Ivanov v. Russia*, decision of 20 February 2007, no. 35222/04, p. 4.

101 *Gusinskiy v. Russia*, judgment of 19 May 2004, no. 70276/01, paras. 73-78.

102 *Lutsenko v. Ukraine*, judgment of 3 July 2012, no. 6492/11, paras. 104-110.

103 *Tymoshenko v. Ukraine*, judgment of 30 April 2013, no. 49872/11, paras. 294-301.

104 *Merabishvili v. Georgia*, [Grand Chamber] judgment of 28 November 2017, no. 72508/13.

105 *Id.* para. 316.

106 *Id.* paras. 310-311.

## IV. PROPORTIONALITY

There are several invisible provisions of the Convention - concepts and rights which are not to be found expressly anywhere in the wording of the text but which have become over the years an integral part of Convention law. Of these, **proportionality** is the most significant and is at the heart of all justification for interferences with Convention rights.

There are a number of key tests which can be applied to any Convention question:

1. Have “relevant and sufficient reasons” been advanced for any interference with a Convention right? Is it “necessary in a democratic society”? Does it correspond to a “pressing social need”?
2. Is there an alternative action which would have interfered less? Has it been considered? Have relevant and sufficient reasons been given for rejecting it?
3. Were procedural safeguards both in place and observed so as to avoid the possibility of abuse?
4. Does the interference operate so as to “impair the very essence of the right”?

## V. THE CONVENTION’S RELATIONSHIP WITH NATIONAL AND INTERNATIONAL LAW

### i. Subsidiarity

An express reference to the principle of subsidiarity will be introduced into the Preamble of the Convention once Protocol 15 enters into force<sup>107</sup>. Nonetheless, it has long been considered as a principle deeply embedded in the Convention and the Court has been referring to it since its early case law (for the first time in the *Belgian linguistic case*<sup>108</sup>). The principle of subsidiarity embodies the shared responsibility of the States and the Court for realising the effective implementation of the Convention<sup>109</sup>. Accordingly, it has a two-sided nature. On the one hand, the States are responsible for securing the rights and the freedoms guaranteed by the Convention and for providing effective remedies when necessary. This obligation falls on all national authorities, including domestic courts. On the other hand, the Court cannot assume the role of the competent national authorities in doing so and must therefore

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107 Protocol 15 was adopted on 24 June 2013; it will enter into force once all member States ratify it.

108 *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, “*Belgian linguistic case*”, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

109 See the 2012 Brighton Declaration.



recognise a margin of appreciation enabling them to choose the appropriate measures. Its obligation is to supervise the conformity of these measures with the requirements of the Convention. As regards the domestic courts' decisions in particular, the Court has repeatedly said that it is not a fourth-instance court and it cannot take the place of the national courts, which are first and foremost responsible to assess the facts of a case and the applicable law; it will only move on to make such an assessment itself when this is required to ensure that the decisions in question are not in themselves in breach of the Convention.

## **ii. The margin of appreciation**

The doctrine of the “margin of appreciation” is a creature of international law. It defines the relationship between a supranational court - the European Court of Human Rights - and national courts. Under the Convention, States are free to adopt whatever means they choose to protect Convention rights, subject to the eventual supervision of the Convention organs. The Convention does not demand the same standards to be applied uniformly throughout the 47 Member States of the Council of Europe with their widely different social, cultural, economic and legal systems. In this respect, Convention law is very different from European Union law which does demand a very high degree of uniformity. So long as the States have “secured” the protected rights, as required by Article 1, they have a margin of appreciation as to how they do so. Whether this margin is wide or narrow will depend on the right involved and the circumstances of the case. As is the case with the principle of subsidiarity, the doctrine of the margin of appreciation has been “invisible” but will be introduced into the preamble to the Convention once Protocol 15 enters into force<sup>110</sup>.

## **iii. Article 53 (Safeguard for existing human rights)**

Article 53 is another manifestation of the principle of subsidiarity in that it recognises that States may provide additional protection for human rights, with the Convention being the absolute minimum. Additional protection may be afforded either via the domestic legislation or via international agreements to which each State may be a party, particularly those that are more thematic. Indicatively, these may be: the Convention on the Rights of the Child; the Council of Europe Convention on Action against Trafficking in Human Beings; the 1951 Refugee Convention; the Convention on the Rights of Persons with Disabilities, EU law, and the UN human rights instruments. The Court has long referred to such international instruments, when interpreting the Convention.

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110 Supra note 107.

## VI. AUTONOMOUS CONCEPTS

The European Commission and Court of Human Rights have adopted a particular “Convention meaning” for a number of phrases – a meaning which is often different from that found both in national law and in layman’s speech. This approach is justified by the need to secure a degree of uniformity of treatment in the contracting parties as well as to ensure that States do not use their own definitions to circumvent the rights and freedoms guaranteed by the Convention. Since its first judgments on the issue of the autonomous meaning of certain phrases (*Engel v. Netherlands*<sup>111</sup> & *König v. Germany*<sup>112</sup>), the Court has highlighted on numerous occasions that the definitions under domestic law serve as just a starting point. Hence, when using Convention provisions and case law, it is important to be familiar with these autonomous concepts and their definitions.

### i. Definition of terms used in the Convention text<sup>113</sup>

#### Torture (Article 3)

This involves suffering of a particular intensity and cruelty, attaching a “special stigma to deliberate inhuman treatment causing very serious and cruel suffering” (*Ireland v. the United Kingdom the United Kingdom*<sup>114</sup>). Suffering can be physical or mental provided that it is sufficiently serious (*the Greek Interstate case*<sup>115</sup>).

#### Inhuman treatment (Article 3)

Covers at least such treatment as deliberately causes severe mental and physical suffering (See *Greek Interstate case*<sup>116</sup>). The ill-treatment “must attain a minimum level of severity” if it is to amount to inhuman treatment (*Ireland v. the United Kingdom the United Kingdom*<sup>117</sup>). In contrast with torture, intention to cause suffering is not necessary, nor is there a requirement that the suffering is purposeful. A further distinction between torture and inhuman treatment lies in the degree of suffering. In

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111 *Engel v. Netherlands*, judgment of 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, para. 81.

112 *König v. Germany*, judgment of 28 June 1978, no. 6232/73, paraS. 88-90.

113 Note that the Articles in parentheses refer to the Article in light of which the respective concept has predominantly been examined by the Court; thus, there is a reference to a particular Article also for concepts that are not included in the text of the Article mentioned (e.g. “civil service” or “moral and physical integrity”).

114 *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, para. 167.

115 *The Greek Case – Denmark, Norway, Sweden and Netherlands v. Greece*, Commission Report of 05 November 1969, nos. 3321/67, 3322/67, 3323/67 and 3344/67.

116 *Ibid.*

117 *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, para. 162.

1999, the Court adopted a lower threshold in that it asserted that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified as “torture” (*Selmouni v. France*<sup>118</sup>).

### **Degrading treatment (Article 3)**

This consists of treatment or punishment which grossly humiliates a person before himself or others or drives him to act against his will or conscience. “Degrading” is given its ordinary dictionary meaning.

### **Slavery (Article 4)**

The Court has adopted the classic definition of slavery contained in the 1926 Slavery Convention, which requires the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an “object” (*Siliadin v. France*<sup>119</sup>).

### **Servitude (Article 4)**

Servitude is a “particularly serious form of denial of freedom” (*Van Droogenbroeck v. Belgium*<sup>120</sup>). For Convention purposes it has been defined as “an obligation to provide one’s services that is imposed by the use of coercion” (*Siliadin v. France*<sup>121</sup>). It is to be linked with the concept of slavery, both of which are examined as questions of status. Servitude is also related to forced or compulsory labour (see below) and it has been regarded by the Court as an “aggravated” forced or compulsory labour; the distinguishing feature between them is the victim’s feeling that their condition is permanent and that it is unlikely to change. It is sufficient that this feeling is based on objective criteria (e.g. the obligation for the ‘serf’ to live on another person’s property and the impossibility of altering his condition) or brought about or kept alive by those responsible for the situation (*C.N. and V. v. France*<sup>122</sup>).

### **Forced labour or Compulsory labour (Article 4)**

“Labour” is not limited to the sphere of manual labour; the word has the broad meaning of all work or service (*Van der Mussele v. Belgium*<sup>123</sup>). The Court has used

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118 *Selmouni v. France*, [Grand Chamber] judgment of 28 July 1999, no. 25803/94, para. 101.

119 *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01, para. 122.

120 *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, no. 7906/77, para. 58.

121 *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01, para. 124.

122 *C.N. and V. v. France*, judgment of 11 October 2012, no. 67724/09, para. 91.

123 *Van der Mussele v. Belgium*, judgment of 23 November 1983, no. 8919/80, para. 33.

the definition found in the ILO Convention No. 29<sup>124</sup> as a starting point, and has accepted that for “forced or compulsory labour” to arise, there must be some physical or mental constraint, as suggested by the adjective “forced”, as well as some overriding of the person’s will, as suggested by the adjective “compulsory”. Accordingly, what there has to be is **work exacted under the menace of any penalty** and also performed against the will of the person concerned, that is, **work for which they have not offered themselves voluntarily** (*ibid.*).

The notion of “penalty” found in the first criterion is used in the broad sense; it may go as far as physical violence or restraint, but it can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal. See, for example, *C.N. and V. v. France*<sup>125</sup>, in which case the Court held that being sent back to her country of origin was seen by the first applicant as a “penalty” and the threat of being sent back as the “menace” of that “penalty” being executed<sup>126</sup>. In *Chowdury and Others v. Greece*<sup>127</sup>, the applicants, who were in a vulnerable situation as illegal migrants without resources at risk of being arrested, detained and deported, continued working because they were afraid that they would lose their overdue - and very low - wages, without which they could neither live elsewhere in Greece nor leave the country<sup>128</sup>. See also *Rantsev v. Cyprus and Russia*<sup>129</sup>, where the Court considered it unnecessary to identify whether the situation of the trafficked person constituted “slavery”, “servitude” or “forced and compulsory labour” and asserted that “trafficking itself...falls within the scope of Article 4”<sup>130</sup>.

As to the issue of whether the person offered themselves voluntarily for the work in question, the individual’s prior consent is not decisive; the Court will rather have regard to all the circumstances of the case in the light of the underlying objectives of Article 4, as these derive from the exceptions set out in paragraph 3 and include the general interest, social solidarity and what is normal in the ordinary course of business. In terms of the latter, the Court has taken into account whether the services rendered fall outside the ambit of the normal professional activities of the person concerned; whether the services are remunerated or not or whether the service includes another compensatory factor; whether the obligation is founded on a conception of

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124 *Forced Labour Convention*, 1930 (No. 29) - Entry into force: 01 May 1932.

125 *C.N. and V. v. France*, judgment of 11 October 2012, no. 67724/09, paras. 68-79.

126 *Id.* para. 78.

127 *Chowdury and Others v. Greece*, judgment of 30 March 2017, no. 21884/15.

128 *Id.* para. 95.

129 *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04.

130 *Id.* para. 282.

social solidarity (e.g. regarding a medical practitioner's duty to participate in an emergency service); and whether the burden imposed is disproportionate.

### Deprivation of liberty (Article 5)

Whether individuals are being **deprived** of their liberty or their movement is merely **restricted** depends on examination of the concrete situation, account being taken of the whole range of criteria such as the type, duration, effects, and manner of implementation of the measure in question (*Guzzardi v. Italy*<sup>131</sup>, *Riera Blume v. Spain*<sup>132</sup>, *Koniarska v. the United Kingdom*<sup>133</sup>, *Austin and Others v. the United Kingdom*<sup>134</sup>, *Creangă v. Romania*<sup>135</sup>). The distinction is important because deprivations of liberty are only permissible in an exhaustive list of situations and are regulated procedurally by Article 5. Restrictions on movement are regulated by Article 2 of Protocol 4. *De Tommaso v. Italy*<sup>136</sup> comprehensively discusses the difference between the two. In some cases such as detention under Article 5 § 1(f) the Court has dispensed with the requirement of necessity and proportionality (*Saadi v. the United Kingdom*<sup>137</sup>) which are still required for restrictions under Article 2 Protocol 4.

### Security of the person (Article 5)

Although Article 5 § 1 guarantees the right to liberty and to “security of the person,” this latter aspect has proved to have no independent existence. It cannot be used to cover ideas of physical integrity which fall, where appropriate, within the scope of Article 8 (right to respect for private and family life) and more extreme cases, Article 3 (prohibition of torture). The term security only refers to protection from arbitrariness in relation to deprivation of liberty.

### Criminal (Article 6)

A person may have been subjected to a “criminal charge” or proceedings for the purpose of attracting the protection of Article 6 (right to a fair trial) even though no “criminal” proceedings in domestic law are involved. In determining the existence of

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131 *Guzzardi v. Italy*, judgment of 6 November 1980, no. 7367/76, para. 92.

132 *Riera Blume v. Spain*, judgment of 14 October 1999, no. 37680/97, para. 28.

133 *Koniarska v. the United Kingdom*, decision of 12 October 2000, no. 33670/96.

134 *Austin and Others v. the United Kingdom*, [Grand Chamber] judgment of 15 March 2012, nos. 39692/09, 40713/09 and 41008/09, para. 57.

135 *Creangă v. Romania*, [Grand Chamber] judgment of 23 February 2012, no. 29226/03, para. 91.

136 *De Tommaso v. Italy*, [Grand Chamber] judgment of 23 February 2017, no. 43395/09, paras. 80-89.

137 *Saadi v. the United Kingdom*, [Grand Chamber] judgment of 29 January 2008, no. 13229/03, para. 72.

a “criminal” charge, *Engel v. Netherlands*<sup>138</sup> established three criteria to be read in light of the autonomy of the concept under the Convention. The Convention institutions have regard to (i) the classification of the offence in domestic law, (ii) the nature of the offence and (iii) the severity of the penalty. It is clear that domestic classification is not determinative if it says a particular charge is not criminal in nature (see *Öztürk v. Germany*<sup>139</sup>), but is determinative if it says that it is criminal. **The Convention does NOT require that formal criminal proceedings are instituted in every case which it considers to be criminal. It does however require that the procedural safeguards of Article 6 are in place.** Practitioners will want to be particularly aware of this where steps are taken or orders made which are based on conduct which could have been (or could be) the subject of criminal proceedings in national law and where a criminal charge, in Convention terms, may thus be involved.

### Charge (Article 6)

“Charge” is “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence” or some other act which carries “the implication of such an allegation and which likewise substantially affects the situation of the suspect” (*Corigliano v. Italy*<sup>140</sup> or *R.L. v. Netherlands*<sup>141</sup>). In *Deweere v. Belgium*<sup>142</sup>, the Court found that a criminal charge had been made when a trader’s business was closed during investigations, though no criminal proceedings were ever instituted. If a suspect is arrested before being charged, a criminal “charge” exists from the date of their arrest, which has a major impact on their situation by enabling the authorities to conduct investigative measures with their participation (*Simeonovi v. Bulgaria*<sup>143</sup>). Neither extradition nor deportation proceedings (even where deportation is imposed as a criminal sanction) have been held to be covered by Article 6 (*Maaouia v. France*<sup>144</sup>)<sup>145</sup>.

138 *Engel v. Netherlands*, judgment of 8 June 1976, nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, para. 82.

139 *Öztürk v. Germany*, judgment of 21 February 1984, no. 8544/79, paras. 49-50.

140 *Corigliano v. Italy*, judgment of 10 December 1982, no. 8304/78, para. 34.

141 *R.L. v. Netherlands*, decision of 18 May 1995, no. 22942/93, pp. 4-5.

142 *Deweere v. Belgium*, judgment of 27 February 1980, no. 6903/75, paras. 41-47.

143 *Simeonovi v. Bulgaria*, judgment [Grand Chamber] of 12 May 2017, no. 21980/04, para. 121.

144 *Maaouia v. France*, [Grand Chamber] judgment of 5 October 2000, no. 39652/98, para. 40.

145 In contrast, Article 47 (2) of the EU Charter of Fundamental Rights offers wider protection in that respect, as “the right to a fair hearing is not confined to disputes relating to civil law rights and obligations” (Explanations relating to the Charter of Fundamental Rights). Nonetheless, considering that the meaning and scope of the rights in the EU Charter is the same as those laid down by the ECHR and as these have been interpreted by the Court, Article 6(1) does apply to all matters covered by EU law and sets the minimum of protection for the purposes of the Convention.

## Civil right (Article 6)

The Convention institutions have refrained from formulating any abstract definition of “civil rights”. Instead they have ruled on the particular facts of each case. The concept of “civil rights” is not to be interpreted solely by reference to the respondent State’s domestic law but is an autonomous notion based on the character of the right (*König v. Germany*<sup>146</sup>). The pertinent issue is whether **the outcome of the proceedings is decisive for private rights and obligations**. Furthermore, there must, at least on arguable grounds, be a basis for the right in domestic law, irrespective of whether that right is protected under the Convention (*Micallef v. Malta*<sup>147</sup>). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, and so on) or the nature of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, and so forth) are not of decisive consequence (*ibid.*).

## Determination (Article 6)

In civil cases this refers to any proceedings which are **decisive** of civil rights and obligations. In criminal cases this refers to **judgment and any subsequent appeals**.

## Scope of the right to a fair trial (Article 6)

The right to a fair trial under Article 6 is not confined to the conduct of judicial proceedings. Where issues which fall within the scope of Article 6 arise, it reaches back to **the administrative stages** of decision making (e.g. in child care cases) and forward to **the execution of the judgment** (*Hornsby v. Greece*<sup>148</sup>). It also requires that there should be legal certainty, that is, consistency between judgments on the same issues delivered by different courts (e.g. *Vincic and Others v. Serbia*<sup>149</sup>, *Tudor Tudor v. Romania*<sup>150</sup>, *Stoilkovska v. Macedonia*<sup>151</sup>). It does not apply to matters which have been considered to be purely administrative such as deportation or extradition.

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146 *König v. Germany*, judgment of 28 June 1978, no. 6232/73, paras. 88-90.

147 *Micallef v. Malta*, [Grand Chamber] judgment of 15 October 2009, no. 17056/06, para. 74.

148 *Hornsby v. Greece*, judgment of 19 March 1997, no. 18357/91, para. 40.

149 *Vincic and Others v. Serbia*, judgment of 1 December 2009, nos. 44698/06, 44700/06, 44722/06 and other, para. 56.

150 *Tudor Tudor v. Romania*, judgment of 24 March 2009, no. 21911/03, paras. 26-32.

151 *Stoilkovska v. Macedonia*, judgment of 18 July 2013, no. 29784/07, paras. 39-40 and 44-49.

## Independent tribunal (Article 6)

The phrase is to be found in Article 6(1), where the requirement of an “independent and impartial tribunal” is set out. The Court has considered that the concepts of independence and impartiality (see below) are related but quite distinct (*Pullar v. the United Kingdom*<sup>152</sup>).

An independent tribunal is a tribunal that is independent of the executive and of the parties to the case. In determining whether a tribunal can be considered to be independent, the Court has had regard, inter alia, to the manner of appointment of its members and the duration of their term of office (e.g. a short renewable term may be questionable, see *Incal v. Turkey*<sup>153</sup>), the existence of guarantees against outside pressures (e.g. not taking instructions from the executive or not accepting as binding the executive’s advice on the interpretation of treaties, see the *Greek Interstate case* and *Beaumartin v. France*<sup>154</sup> respectively), and the question whether there is a legitimate doubt regarding the appearance of independence (see *Campbell and Fell v. the United Kingdom*<sup>155</sup>).

## Impartial tribunal (Article 6 § 1)

Impartiality means lack of prejudice or bias; for the determination of impartiality, there are two aspects to be considered: a) the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed in duly appointed judges unless there is evidence to the contrary; b) the tribunal must also be impartial from an objective viewpoint. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the accused, as far as criminal proceedings are concerned, or, in civil cases, in the parties. The standpoint of the latter is important but not decisive; the crucial issue is whether there is a legitimate reason to fear a lack of impartiality (*Hauschildt v. Denmark*<sup>156</sup>).

## Tribunal (Article 6)

The word “tribunal” in Article 6 § 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial

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152 *Pullar v. the United Kingdom*, judgment of 10 June 1996, no. 22399/93, para. 29.

153 *Incal v. Turkey*, [Grand Chamber] judgment of 9 June 1998, no. 22678/93, paras. 65 and 68.

154 *Beaumartin v. France*, judgment of 24 November 1994, no. 15287/89, para. 38.

155 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77, paras. 78 and 85.

156 *Hauschildt v. Denmark*, judgment of 24 May 1989, no. 10486/83, para. 48.



machinery of the country (*Campbell and Fell v. the United Kingdom*<sup>157</sup>). The criterion is rather that the institution in question has full jurisdiction to take legally binding decisions which may not be altered by a non-judicial authority (*Findlay v. the United Kingdom*<sup>158</sup>). The fact, however, that the institution exercises judicial functions does not suffice. The use of the term “tribunal” is “warranted only for an organ which satisfies a series of further requirements” (*Le Compte, Van Leuven and De Meyere v. Belgium*<sup>159</sup>), such as independence and impartiality, as discussed above.

### Civil Service (Article 6 § 1)

In its leading judgment in *Pellegrin v. France*<sup>160</sup>, the Court held that it was important, with a view to applying Article 6(1), to establish an autonomous interpretation of the term “civil service” which would make it possible to afford equal treatment to public servants, irrespective of the legal nature in domestic law of the relation between the official and the administrative authority. To that end, the Court has adopted a functional criterion based on the nature of the official’s duties and responsibilities. The Court will seek to ascertain in each case whether the applicant’s post entailed direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities (*Frydlender v. France*<sup>161</sup>). A manifest example would be the duties of the armed forces and the police.

### Family (Article 8)

The concept of the “family” is now understood as extending beyond formal legitimate relationships and arrangements (*Johnston and Others v. Ireland*<sup>162</sup>). The Convention organs have increasingly taken into account the substance and reality of relationships, acknowledging developments in social practices and the law in European states. Historically, the European Court of Human Rights did not generally recognise homosexual relationships as family life but as a part of private life. However the Court now considers that where such a relationship is akin to marriage it can be considered family life.

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157 *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, nos. 7819/77 and 7878/77, para. 76.

158 *Findlay v. the United Kingdom*, judgment of 25 February 1997, no. 22107/93, para. 77.

159 *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, nos. 6878/75 and 7238/75, para. 55.

160 *Pellegrin v. France*, [Grand Chamber] judgment of 8 December 1999, no. 28541/95, para. 63.

161 *Frydlender v. France*, [Grand Chamber] judgment of 27 June 2000, no. 30979/96, paras. 33-41.

162 *Johnston v. Ireland*, judgment of 18 December 1986, no. 9697/82, paras 55-56.

## Private life (Article 8)

This concept embraces the sphere of immediate personal autonomy. This covers aspects of moral and physical integrity (*X and Y v. Netherlands*<sup>163</sup>) (see also below under “moral and physical integrity”). It is wider than the right to “privacy” in the sense of being able to keep hidden or secret things which one does not want to disclose or expose. Private life ensures a sphere within which everyone can freely pursue the development and fulfilment of his personality. This comprises the right to an identity (including names and one’s own image) and includes the right to develop relationships with other people, in particular in the emotional field and including sexual relationships with other persons, as well as activities of a professional or business nature (*Niemietz v. Germany*<sup>164</sup>). It includes the “network of personal social and economic relations that make up the private life of every human being” (*Slivenko v. Latvia*<sup>165</sup>). The Court has now recognised that a person’s reputation will often be significant in developing those relationships and as such is therefore protected under this rubric of Article 8. The right to one’s image has been examined with respect to the publication of photos of people that are, generally or have come temporarily to be, in the public eye (in which cases the Court has realised a balancing exercise between the right to private life and the freedom of expression, see *Von Hannover v. Germany (No. 2)*<sup>166</sup>) as well as “ordinary persons” (in which cases no interference could be justified by a legitimate aim protected by the Convention, see (*Georgi Nikolaishvili v. Georgia*<sup>167</sup>).

## Moral and physical integrity (Article 8)

An individual’s “moral and physical integrity”, that is, physical and psychological well-being, is protected under the private life rubric of Article 8 (see above under “private life”).

It is, however, also a term that is being used in connection to treatment or conditions that fall below the “threshold of severity” required by Article 3 (*Costello-Roberts v. the United Kingdom and Raninen v. Finland*<sup>168</sup>).

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163 *X and Y v Netherlands*, judgment of 26 March 1985, no. 8978/80, para. 22.

164 *Niemietz v. Germany*, judgment of 16 December 1992, no. 13710/88, para. 29.

165 *Slivenko v. Latvia*, [Grand Chamber] judgment of 9 October 2003, no. 48321/99, para. 96.

166 *Von Hannover v. Germany (No. 2)*, [Grand Chamber] judgment of 7 February 2012, nos. 40660/08 and 60641/08, paras 95-126.

167 *Georgi Nikolaishvili v. Georgia*, judgment of 13 January 2009, no. 37048/04, para. 123.

168 *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, no. 13134/87, paras. 29-36, and *Raninen v. Finland*, judgment of 16 December 1997, no. 20972/92, paras. 52-64.

## Home (Article 8)

Home has been given a wide definition by the Convention organs. It is not necessary that a home be lawfully established, with significance attaching more to the nature of the occupation than to its legality, but it does not extend to a place which one would like to occupy as one's home. Further, since "home" and "private life" may overlap with business and professional activities, the protection of Article 8 (right to respect for private and family life) has been found to extend to personal offices (*Niemietz v. Germany*<sup>169</sup>) and for companies to company premises (*Société Colas Est and Others v. France*<sup>170</sup>).

## Freedom of expression (Article 10)

Considered as one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man (*Handyside v. the United Kingdom*<sup>171</sup>), freedom of expression has been interpreted broadly; accordingly, any potential exceptions to it has been interpreted narrowly (*Sunday times v. the United Kingdom (No.1)*<sup>172</sup>). The Article covers not only "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb (*Handyside v. the United Kingdom*<sup>173</sup>), including incitement to hatred, obscenity and blasphemy, and pornography.

Any content is protected (e.g. political views, advertising, artistic expression, etc.) as is any means of expression, including (but not limited to) books, leaflets, cartoons, paintings, workshops and seminars, dissemination via the internet and press. In fact, in their exercise of this right, persons or organisations are entitled to choose which means they consider appropriate (e.g. *Women on Waves and Others v. Portugal*<sup>174</sup>). Among these means, press is of particular importance in light of its vital role in democratic societies as a "public watchdog" (e.g. *Financial Times Ltd and Others v. the United Kingdom*<sup>175</sup>)<sup>176</sup>. Such a role of a "public watchdog" has been recognised for civil societies and as a result their activities have been considered to warrant similar Convention protection to that afforded to the press (*Youth Initiative for Human*

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169 *Niemietz v. Germany*, judgment of 16 December 1992, no. 13710/88, para. 30.

170 *Société Colas Est and Others v. France*, judgment of 16 April 2002, no. 37971/97, paras. 40-41.

171 *Handyside v. the United Kingdom*, judgment of 7 December 1976, no. 5493/72, para. 49.

172 *Sunday times v. the United Kingdom (No. 1)*, judgment 26 April 1979, no. 6538/74, para. 65.

173 *Handyside v. the United Kingdom*, judgment of 7 December 1976, no. 5493/72, para. 49.

174 *Women on Waves and Others v. Portugal*, judgment of 3 February 2009, no. 31276/05, para. 38.

175 *Financial Times Ltd and Others v. the United Kingdom*, judgment of 15 December 2009, no. 821/03, para. 59.

176 See also *Sunday times v. the United Kingdom*, judgment 26 April 1979, no. 6538/74.

*Rights v. Serbia*<sup>177</sup>; see also *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*<sup>178</sup>).

In light of the role of the press and civil societies as a public watchdog, the Court broadened its approach vis-à-vis a potential right to receive information under Article 10. In *Magyar Helsinki Bizottság v. Hungary*<sup>179</sup> and *Youth Initiative for Human Rights v. Serbia*<sup>180</sup>, where the Court re-visited its previous case law on the matter, the conclusion was that Article 10 does not confer on the individual a right of access to information held by a public authority nor obliges the Government to impart such information to the individual. However, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.

### Associations (Article 11)

The Court has examined the meaning of the autonomous concept of "associations" in light of the link between democracy, pluralism and freedom of association (*Chassagnou and others v. France*<sup>181</sup>). An obvious example of "associations" playing a crucial role in ensuring pluralism and democracy are political parties. However, the concept includes any legal entity established by individuals with the aim to act collectively in a field of mutual interest, such as associations protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness (*Gorzelik and others v. Poland*<sup>182</sup>). Where an association has both private and public law characteristics, the Court will examine which characteristics prevail. For example, in *Sigurjonsson v. Iceland*<sup>183</sup>, the Court concluded that, although the association under question performed

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177 *Youth Initiative for Human Rights v. Serbia*, judgment of 25 June 2013, no. 48135/06, para. 20.

178 *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [Grand Chamber] judgment of 27 June 2017, no. 17224/11, paras. 86-87. The Court held that the criteria that generally apply to the dissemination of defamatory statements by the media in the exercise of its public watchdog also apply to NGOs; these include, inter alia, the requirement to verify factual statements (paras. 108-109).

179 *Magyar Helsinki Bizottság v. Hungary*, [Grand Chamber] judgment of 08 November 2016, no. 18030/11.

180 *Youth Initiative for Human Rights v. Serbia*, judgment of 25 June 2013, no. 48135/06.

181 *Chassagnou and others v. France*, [Grand Chamber] judgment of 29 April 1999, nos. 25088/94, 28331/95 and 28443/95, para. 100.

182 *Gorzelik and others v. Poland*, [Grand Chamber] judgment of 17 February 2004, no. 44158/98, para. 92.

183 *Sigurjonsson v. Iceland*, judgment of 30 June 1993, no. 16130/90.

certain functions which were to some extent provided for in the applicable legislation and served not only its members but also the public at large, the association had in fact been established under private law and enjoyed full autonomy in determining its own aims, organisation and procedure<sup>184</sup>.

### Right to marry (Article 12)

The wording of Article 12 has been considered to suggest that the right to marry is limited to unions between a man and a woman. In *Christine Goodwin v. the United Kingdom*<sup>185</sup>, the Court accepted that the right to marry extends to transsexuals, on the basis that the terms “men” and “women” can no longer be assumed to refer to a determination of gender by purely biological criteria<sup>186</sup>. On the contrary, it does not extend to same-sex marriages, as at the time that the Court gave its ruling in *Schalk and Kopf v. Austria*<sup>187</sup>, there seemed to be no European consensus regarding the issue<sup>188</sup>. The right to marry does not include a right to divorce (*Johnston and Others v. Ireland*<sup>189</sup>). In contrast to the wider Article 8, the right to found a family in Article 12 seems to be restricted to married couples. The right of same-sex couples to form civil unions has, for example, been examined in light of Article 14 taken together with Article 8 (see *Vallianatos and Others v. Greece*<sup>190</sup>).

### Effective remedy (Article 13)

The remedy available at national level to deal with “arguable complaints” regarding the substance of rights and freedoms guaranteed by the Convention must be effective in practice as well as in law (e.g. *Iovchev v. Bulgaria*<sup>191</sup>) – in the sense either of preventing the alleged violation, or remedying the impugned state of affairs, or of providing adequate redress for any violation that has already occurred.

Various factors may play a role when determining the effectiveness of a remedy: the circumstances of the case (for example, compensation may not be enough, e.g.

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184 Id. para. 31.

185 *Christine Goodwin v. the United Kingdom*, [Grand Chamber] judgment of 11 July 2002, no. 28957/95.

186 Id. para. 100.

187 *Schalk and Kopf v. Austria*, judgment of 24 June 2010, no. 30141/04.

188 Id. para. 58.

189 *Johnston v. Ireland*, judgment of 18 December 1986, no. 9697/82, paras. 51-54.

190 *Vallianatos and Others v. Greece*, [Grand Chamber] judgment of 7 November 2013, nos. 29381/09 and 32684/09, paras. 70-92.

191 *Iovchev v. Bulgaria*, judgment of 2 February 2006, no. 41211/98, par. 142.

*Petkov and Others v. Bulgaria*<sup>192</sup>), the powers and the procedural guarantees which the competent national authority affords (e.g. *Klass and Others v. Germany*<sup>193</sup>), or the right relied on (for example, in expulsion cases, where there is a complaint of a real risk of violation of the person's rights under Article 2, or Article 3, or Article 4 of Protocol No. 4, effectiveness also requires that there is access to a remedy with automatic suspensive effect; see *De Souza Ribeiro v. France*<sup>194</sup>). Although the context of the violation complained of is also relevant (for example, in *Klass and Others v. Germany*, the Court has found that the remedy must be as effective as can be having regard to the restricted scope for recourse inherent in a system of secret surveillance<sup>195</sup>; even in such cases though there is a minimum standard guaranteed by Article 13 (*Al-Nashif v. Bulgaria*<sup>196</sup>)), this context is seen in light of the particular Article relied on; thus, the requirement of a remedy “as effective as can be” may be appropriate when examining Articles 8 and 10, whose examination may require the Court to have regard to the national security claims advanced by the Government, whereas it is not in cases where irreversible harm may occur in respect of a complaint under Article 3 (*Chahal v. the United Kingdom*<sup>197</sup>).

### Victim (Article 34)

A victim is an individual, group of individuals, or non-governmental organisation whose rights under the Convention have been violated or are threatened with violation. Legal persons such as companies can be victims of Convention violations as well as natural persons (human beings). **It is not necessary to show quantifiable damage to be a victim or to bring national proceedings** under the Convention. Complaints to the Strasbourg Court may be declared inadmissible if the victim has suffered “no significant disadvantage” but the person (legal or physical) is still a “victim” of a violation for the purposes of national law. The question of damage suffered (as opposed to “no significant disadvantage”) is only relevant to the issue of just satisfaction.

### Property or possessions (Article 1 Protocol 1)

These terms cover a wide range of interests. **Possession** has an autonomous meaning not limited to ownership of physical goods – other rights and interests constituting assets can also be regarded as **property rights** (*Gasus Dosier v. The*

192 *Petkov and Others v. Bulgaria*, judgment of 11 June 2009, nos. 77568/01, 178/02 and 505/02, para. 79.

193 *Klass and Others v. Germany*, judgment of 6 September 1978, no. 5029/71, para. 67.

194 *De Souza Ribeiro v. France*, [Grand Chamber] judgment of 13 December 2012, no. 22689/07, para. 82.

195 *Klass and Others v. Germany*, judgment of 6 September 1978, no. 5029/71, para. 69.

196 *Al-Nashif v. Bulgaria*, judgment of 20 June 2002, no. 50963/99, para. 137.

197 *Chahal v. the United Kingdom*, [Grand Chamber] judgment of 15 November 1996, no. 22414/93, paras. 150-151.

*Netherlands*<sup>198</sup>) including an enforceable judgment debt (*Ryabykh v. Russia*<sup>199</sup>; see also the *Stran Greek Refineries case*<sup>200</sup>). It is the debt itself which is the possession, as Article 1 of Protocol 1 only applies to existing possessions and does not otherwise confer a right to obtain property (*Marckx v. Belgium*<sup>201</sup>). There is also some authority for the view that a trivial effect on property rights will not constitute an interference (*Langborger v Sweden*<sup>202</sup>).

### Collective expulsion/rejection (Article 4 of Protocol 4)

The wrong addressed by this provision is the absence of an individualised assessment of each individual's situation and not the consequences of the expulsion or rejection as is the case, for example, with rejected asylum seekers who are at risk of prohibited ill-treatment. It applies to all aliens/migrants. It can apply to group expulsions (see e.g. *Čonka v. Belgium*<sup>203</sup>) or to group pushbacks at the border (see e.g. *N.D. and N.T. v. Spain*<sup>204</sup>). But not all expulsions of a group of people will be collective (see *Khlaifia and Others v. Italy*<sup>205</sup>, in which case no violation of Article 4 of Protocol 4 was found on the basis that each of the applicants had been identified individually and they had had a genuine and effective possibility of raising arguments against their expulsion<sup>206</sup>). It is a rapidly evolving area of the law.

### ii. Convention concepts that have been developed jurisprudentially

#### Equality of arms

Parties to a dispute or charged with a criminal offence must not be placed at a substantial disadvantage vis-à-vis their opponent. The requirement of “equality of arms”, in the sense of a “fair balance” between the parties, applies to criminal cases as

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198 *Gasus Dosier v. The Netherlands*, judgment of 23 February 1995, no. 15375/89, para. 53.

199 *Ryabykh v. Russia*, judgment of 24 July 2003, no. 52854/99, para. 61.

200 *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 09 December 1994, no. 13427/87, paras. 59-62.

201 *Marckx v Belgium*, judgment of 13 June 1979, no. 6833/74, para. 50.

202 *Langborger v. Sweden*, judgment of 22 June 1989, no. 11179/84, para. 41.

203 *Čonka v. Belgium*, judgment of 5 February 2002, no. 51564/99, paras. 59-63.

204 *N.D. and N.T. v. Spain*, judgment of 3 October 2017, nos. 8675/15 and 8697/15, paras. 103-105. On 29 January 2018 the Grand Chamber Panel accepted the government's request that the case be referred to the Grand Chamber.

205 *Khlaifia and Others v. Italy*, [Grand Chamber] judgment of 15 December 2016, no. 16483/12.

206 *Id.* paras. 248-254.

well as civil rights and obligations cases (see *Dombo Beheer B.V. v. the Netherlands*<sup>207</sup>). The appearance of the fair administration of justice and the seriousness of what is at stake for the applicant is of relevance when assessing the adequacy and fairness of the procedures (*A.B. v. Slovakia*<sup>208</sup>). It is irrelevant whether “further, quantifiable unfairness” derived from procedural inequality (*Bulut v. Austria*<sup>209</sup>).

### **Inherent procedural safeguards**

Inherent procedural safeguards are found by the Court to be contained in Articles 2, 3 and 8 in themselves and exist in addition to the protection offered by Article 13 and, where appropriate, Article 6. Article 6 affords a procedural safeguard in the determination of civil rights and obligations but only if they exist in national law. In contrast, the procedural requirements inherent in Article 8 cover administrative procedures as well as judicial proceedings but often afford protection where no right otherwise exists in national law (*McMichael v. the United Kingdom*<sup>210</sup>).

### **Effectiveness of Rights - “practical and effective not theoretical and illusory”**

The Convention is a system for the protection of human rights. This makes it of crucial importance that it is interpreted and applied in a manner which renders these rights **practical and effective not theoretical and illusory**. A State cannot therefore fulfil its obligations by protecting a right in a superficial or self-defeating manner. Although Article 1 requires that national law should protect Convention rights (expressly or in substance) this is a necessary but not sufficient requirement. Effective protection must exist in practice. For example, it is not enough for an accused simply to be provided with a lawyer. The legal assistance given must be effective (*Artico v. Italy*<sup>211</sup>).

### **Law and quality of law**

To meet a Convention requirement that an interference is “in accordance with the law” or “prescribed by law” that law must be **precise and ascertainable** so that an individual may regulate his conduct by it: they must be able - if need be with appropriate legal advice - to *foresee*, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The law must also be adequately accessible, that is, the citizen must be able to have an indication about its existence

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207 *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, no. 14448/88, para. 33.

208 *A.B. v. Slovakia*, judgment of 04 March 2003, no. 41784/98, para. 55.

209 *Bulut v. Austria*, judgment of 22 February 1996, no. 17358/90, para. 49.

210 *McMichael v. the United Kingdom*, judgment of 24 February 1995, no. 16424/90, para. 90.

211 *Artico v. Italy*, judgment of 13 May 1980, no. 6694/74, para. 33.



that is adequate in the circumstances of the legal rules applicable to a given case (*Sunday Times v. the United Kingdom*<sup>212</sup>). A law authorising interferences with Convention rights must not be so broadly worded that it permits interferences which would violate the Convention (see *Hashman and Harrup v. the United Kingdom*<sup>213</sup>).

### **Living instrument**

The Court has frequently emphasised that Convention protection and the content of the rights are not frozen at the date at which the text was adopted more than sixty years ago. The Convention is a “living instrument” (*Tyrer v. the United Kingdom*<sup>214</sup>) and the case law must therefore be “dynamic and evolutive” so that it is not a bar to reform or improvement (e.g. *Bayatyan v. Armenia*<sup>215</sup>). Matters such as sexual behaviour, the changing nature of family structures, and prisoners’ rights have all been interpreted in the light of a consensus of modern European thinking. The Convention jurisprudence is conservative and follows rather than leads the consensus.

## **VII. POSITIVE OBLIGATIONS**

The Convention largely protects individuals from interferences by the State with their fundamental rights. It thus imposes negative obligations on States to refrain from such interferences. However, Article 1 also demands that States “secure” the rights. The Court has therefore held in many cases that States are under a positive obligation to take steps to ensure that Convention rights are protected, not just to refrain from negative interferences. These positive obligations can take many forms; these may be grouped in two main types: a) substantive positive obligations, which concern the substantive measures that the State must put in place in order to secure that anyone in their jurisdiction fully enjoys the Convention rights and freedoms (e.g. adopting legislation that prohibits, say, forced or compulsory labour), and b) procedural, which concern the procedures that the State must put in place in order to respond to any alleged violation (e.g. carry out an adequate and effective investigation when a violation of a Convention right is alleged).

The most obvious form of the State’s positive obligations is that contained in Article 13 to provide an effective remedy before national authority for any violations of the protected rights.

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212 *Sunday Times v. the United Kingdom*, judgment 26 April 1979, no. 6538/74, para. 49.

213 *Hashman and Harrup v. UK*, [Grand Chamber] judgment of 25 November 1999, no. 25594/94, paras. 31–43.

214 *Tyrer v. the United Kingdom*, judgment of 25 April 1978, no. 5856/72, para. 31.

215 *Bayatyan v. Armenia*, [Grand Chamber] judgment of 7 July 2011, no. 23459/03, paras. 98 and 102.

Article 1 also demands that a judicial sanction must exist to protect certain rights and in some cases the Court has gone so far as to state that this must be a criminal sanction (*X and Y v. the Netherlands*<sup>216</sup>). At very least a State must have in place laws which ensure that Convention rights are adequately protected from infringements both by State officials and private individuals.

The State is also under a duty to have allocated sufficient resources to its justice system to ensure that judicial proceedings are dealt with expeditiously (*Guincho v Portugal*<sup>217</sup>). But the positive obligations go further than this.

The State must also take active steps to ensure that individuals can exercise their Convention rights in practice. In *Artze für das Leben v Austria*<sup>218</sup> the Court held that, not only was the State obligated under Articles 10 and 11 to permit a demonstration to take place, but it was also obligated to protect the demonstrators from the actions of counter demonstrators. The Court set out in the case of *Osman v. the United Kingdom*<sup>219</sup> a test which has since been applied many times: **“Did the State take all reasonable steps to protect an individual from harm of which it knew or ought to have known?”**<sup>220</sup>

*Hoffmann v. Austria*<sup>221</sup> concerned a private law child custody dispute between parents. The Austrian Government maintained that it was therefore not responsible for the result of the legal dispute which was a purely private matter. The Court disagreed, holding that the State was responsible **through its courts** for providing the necessary protection for Convention rights where their enjoyment is affected by disputes between private persons<sup>222</sup>.

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216 *X and Y v. the Netherlands*, judgment of 26 March 1985, no. 8978/80, para. 27.

217 *Guincho v. Portugal*, judgment of 10 July 1984, no. 8990/80, para. 40.

218 *Plattform “Ärzte für das Leben” v. Austria*, judgment of 21 June 1988, no. 10126/82, para. 32.

219 *Osman v. the United Kingdom*, [Grand Chamber] judgment of 28 October 1998, no. 23452/94.

220 *Id.* para. 116.

221 *Hoffmann v. Austria*, judgment of 23 June 1993, no. 12875/87.

222 *Id.* paras. 32-36.

## Chapter 3

### Short guide to the system of the ECtHR

This chapter provides an overview of the way the system of the Court's deliberation works, from the moment an application is filed until after a final judgment is delivered. Its aim is not to provide a thorough presentation of the procedure before the Court, but rather to make the reader familiar with the main tools of the Court's deliberation and facilitate the use of its decisions and judgments in the domestic legal order. Thus, the first subpart provides an outline of an application's path, whereas more attention has been given to the second and third subparts, which present the different means of the Court's deliberation and exemplify the importance of the stage starting after a judgment respectively.

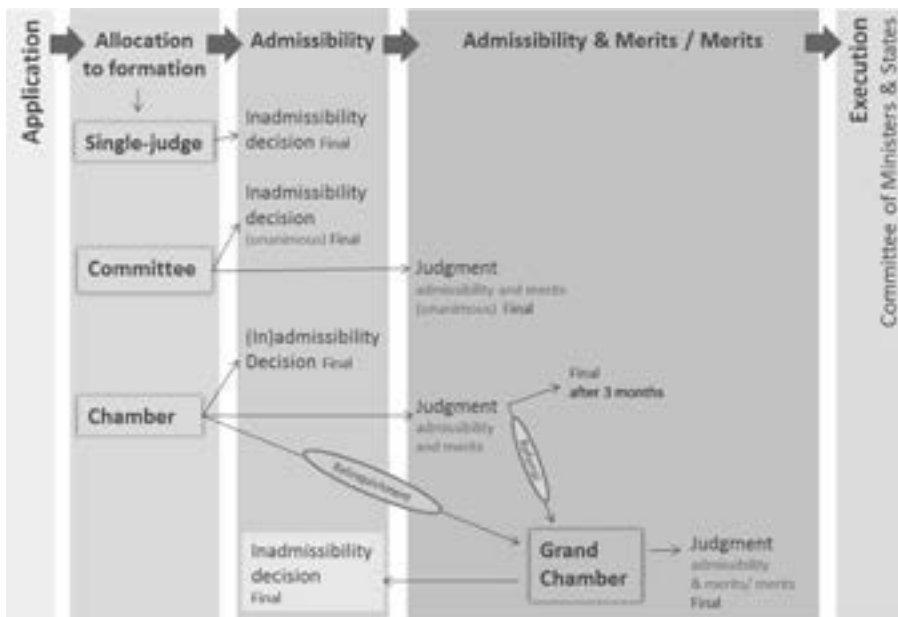
#### I. AN APPLICATION'S PATH

After an application is filed with the Registry, the case is allocated to a judicial formation, either a single-judge formation or a Committee or a Chamber depending on the circumstances (see section II below), which will decide on the application's admissibility. Nowadays, the admissibility and the merits of an application are most often examined and decided together; thus, a decision purely on admissibility is in almost all cases a simple decision to declare the case inadmissible unless the case raises an important issue about admissibility (e.g. *Banković and Others v. Belgium and Others*<sup>223</sup>). Unless a friendly settlement is reached or a Committee of 3 judges delivers a judgment on the merits (see section II below), a Chamber of the Court will go on to examine the case. The Chamber will deliver its judgment unless it relinquishes its jurisdiction to the Grand Chamber under Article 30 (see section II below). The parties have the right to request referral of a case to the Grand Chamber within a period of 3 months from the date of the delivery of the judgment of a Chamber. If such request is accepted, the Grand Chamber examines the case and delivers a final judgment. Final judgments are transmitted to the Committee of Ministers of the Council of Europe (hereafter, "Committee of Ministers"), which is responsible for supervising their execution by the respondent State (Article 46(2))<sup>224</sup>.

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223 *Banković and Others v. Belgium and Others*, [Grand Chamber] decision of 12 December 2001, no. 52207/99.

224 The Committee of Ministers is the Council of Europe's statutory decision-making body and is made up of representatives of the governments of the 47 Member States. Its powers regarding the supervision of the execution of the Court's judgments are governed by the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements", hereafter "Rules of the Committee". In this task, the Committee is assisted by the Department for the Execution of Judgments of the Court.



## II. THE COURT'S VOICE

### i. Tools of judicial deliberation

From the time an application is allocated to a formation, the Court, in each different formation depending on the circumstances of the case and the stage of the proceedings, will rule on the admissibility and, where appropriate, the merits of an application, using the following tools of deliberation:

#### a. Decisions: admissibility

The Court rules on the admissibility of a case by means of a *decision*. Decisions on inadmissibility are **final**.

The admissibility criteria are set out in Article 35 and include the exhaustion of all domestic remedies and a time limit of six months<sup>225</sup> from the date on which the final decision was taken at the domestic level (Article 35 § 1). Further admissibility criteria are set out in paragraphs 2 and 3 as regards individual applications. These include the requirement that an application is not anonymous and that it has not previously been examined by the Court or already submitted to another international

<sup>225</sup> This will be shortened to four months once Protocol 15 enters into force.

body unless it contains relevant new information. Furthermore, an application shall not be incompatible with the provisions of the Convention or the Protocols, manifestly ill-founded or an abuse of the right of individual application. The Court usually makes a specific statement regarding the question of whether an application as a whole or a particular complaint is manifestly ill-founded. This is largely a question as to whether, following a preliminary assessment of the substance of the case, there is no appearance of a violation and thus no need for further examination on the merits.

Protocol 14 added a second limb to paragraph 3 of Article 35; which introduced a further admissibility criterion requiring that the applicant has suffered a significant disadvantage (Article 35 § 3 (b)). This was inspired by the principle *de minimis non curat praetor* and based on “the idea that a violation of a right should attain a minimum level of severity to warrant consideration by an international Court” (*Korolev v. Russia*)<sup>226</sup>. Two “safeguard clauses”<sup>227</sup> have, however, been included in that limb to ensure that, even where the applicant has not suffered a significant disadvantage, the Court goes on to examine the merits of the case: (i) if respect for human rights as defined in the Convention and the Protocols thereto requires it to do so, or (ii) if the application has not been duly considered by a domestic tribunal. Note, however, that the second proviso is going to be removed once Protocol 15 enters into force.

The competence of the Court *ratione personae*, *ratione materiae*, *ratione loci* and *ratione temporis* (see Chapter 1) is examined as part of the admissibility of a case, namely in respect of the criterion included in Article 35 § 1 (a) concerning the compatibility of the application with the provisions of the Convention or the Protocols thereto.

Note that if a friendly settlement is effected, the Court also strikes the case out by means of a *decision* (Article 39).

Competence to deliver a decision:

- **A single-judge formation:** inadmissibility of an individual application may be declared when it is obvious without further examination of the case (Article 27), for example, when it is clear that domestic remedies have not been exhausted. These decisions are not published; the applicant is informed by letter without details of the reasons for the decision. If the application is not obviously inadmissible, the judge refers the case to a

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226 *Korolev v. Russia*, decision of 1 July 2010, no. 25551/05, p.4.

227 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

three-judge Committee or a Chamber; they do not have the power to declare the application admissible by themselves.

- **Committees of 3 judges**: inadmissibility of an individual application may be declared by a unanimous vote, where such decision can be taken without further examination (Article 28 § 1 (a)). If the Committee cannot reach a unanimous vote, the case is referred to a Chamber.
- **A Chamber (7 judges)**: With regard to individual applications, if no decision is taken under Article 27 or 28 by the above Court formations, or no judgment rendered under Article 28 by a Committee (see below), a Chamber consisting of seven judges shall decide on the admissibility of an individual application; it usually decides on the admissibility and the merits together, but it has the power to do so separately. The Chamber is competent to decide on the admissibility of inter-State applications as well; in such cases, it decides on admissibility separately unless it decides, in exceptional cases, otherwise.
- **Grand Chamber (17 judges)**: When the Grand Chamber has assumed jurisdiction over a case (see below at the part regarding judgments) it may itself deliver a decision on the application's admissibility, as under Article 35(4) applications may be dismissed as inadmissible "at any stage of the proceedings".

#### **b. Judgments: merits**

The Court rules on the merits of a case by means of a *judgment*.

Competence to deliver a judgment:

- **Committees of 3 judges**: they may render a judgment on the merits of a case stemming from an individual application, if the underlying question in the case is already the subject of well-established case law of the Court (Article 28(1)b). For example, imprisonment of persons who have been remanded or detained pending expulsion in police stations for between one and three months has repeatedly been considered contrary to Article 3 due to the nature of police stations per se (e.g. *Iatropoulos and Others v. Greece*)<sup>228</sup>. The judgments of the Committees are final.

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228 *Iatropoulos and Others v. Greece*, (First Section Committee) judgment of 20 April 2017, no. 23262/13, para. 38.

- **A Chamber (7 judges)**: delivers judgments on the merits of individual and inter-state applications. The parties have 3 months following the delivery of a Chamber judgment to request referral of the case to the Grand Chamber for fresh consideration. Requests for referral to the Grand Chamber are examined by a panel of judges which decides whether or not referral is appropriate (Article 43). The judgment becomes final under the conditions of Article 44(2).
- **Grand Chamber (17 judges)**: delivers judgments when a Chamber has relinquished jurisdiction under Article 30 (serious questions are raised or issues of inconsistency with previous case-law may arise) or when the case has been referred to it following a party's request under Article 43. The judgments of the Grand Chamber are final.

### c. Pilot Judgments: repetitive or clone cases

The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications<sup>229</sup>. The Court examines one or more of these applications, whereas the examination of the rest of the cases is adjourned. In its judgment, the Court calls on the State concerned to bring the domestic legislation into line with the Convention, indicating the general measures to be taken.

### ii. Advisory opinions

At present, advisory opinions may be solicited by the Committee of Ministers, according to Article 46 or Article 47. There has not yet been any advisory opinion regarding the execution of judgments according to Article 46, but this is expected to change. After the entry into force of Protocol 16, the highest courts and tribunals of a State Party to the Convention will have the possibility to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms of the Convention.

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229 See Rule 61 of the Court.

### III. AFTER THE JUDGMENT

#### i. The legal obligation of States to execute the Court's judgments

The final judgments of the Court are binding for the respondent State, that was a party to the case (Article 46 § 1). Although, formally, only the respondent State is bound by the obligation to abide by and execute a final judgment. However, it is important that other States draw conclusions from a judgment issued against another State if they face a similar problem, so that they avoid being eventually found in breach of the Convention themselves (see Chapter 4 of the handbook).

Turning to the content of the obligation to execute a final judgment under Article 46, the Court has repeatedly held that this is not limited to paying the injured party the sums awarded by way of just satisfaction; it also includes “the obligation to take further individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects”<sup>230</sup>. Accordingly, the obligation to execute a judgment includes the following:

#### a. The obligation to pay just satisfaction to the injured party-Article 41

Just satisfaction is determined by the Court and may be awarded in respect of:

- (a) pecuniary damage, which can involve compensation both for loss actually suffered and loss, or diminished gain, to be expected in the future
- (b) non-pecuniary damage
- (c) costs and expenses that the injured party has incurred (both at the domestic level and in the proceedings before the Court) in trying to prevent the violation from occurring, or in trying to obtain redress therefore

#### b. Other individual measures

The respondent State has the obligation to put the injured party, as far as possible, in the same situation as that party was prior to the violation of the Convention (*restitutio in integrum*)<sup>231</sup>. To that end, further individual measures may be required in addition to the award of just satisfaction. Individual measures, as well as general measures (mentioned below) are usually determined at the stage of the judgment's

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230 *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No 2)*, [Grand Chamber] judgment of 30 June 2009, no. 32772/02, para. 85.

231 This principle has been adopted by the Court and applied by the Committee of Ministers in several resolutions (Explanatory memorandum of the Recommendation No. R (2000) 2).



execution under the supervision of the Committee of Ministers; the Court indicates specific measures only exceptionally (see below in subpart (ii) of this section).

Examples include: “the striking out of an unjustified criminal conviction from the criminal records, the granting of a residence permit, or the reopening of impugned domestic proceedings”<sup>232,233</sup>. Further examples are: the release of those found to be held illegally, facilitating contact between a parent and child in public care, or re-establishing parental visitation rights.

### c. General measures

The State has an obligation (deriving from Article 46 § 1 and Article 1) to adopt general measures to prevent new violations similar to that or those found or to put an end to continuing violations.

Examples include: “legislative or regulatory amendments, changes of case-law or administrative practice or publication of the Court’s judgment in the language of the respondent state and its dissemination to the authorities concerned”<sup>234</sup>. General measures may also include “practical measures such as the refurbishing of a prison, an increase in the number of judges or prison personnel or improvements in administrative arrangements”<sup>235</sup>.

### ii. Who chooses the individual and general measures?

The **respondent State** is, in principle, free to select and propose the individual and general measures it intends to adopt, provided that such means are compatible with the conclusions set out in the Court’s judgment. This is done **under the**

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232 These examples are included in Rule 6 of the Rules of the Committee of Ministers.

233 In view of the legal difficulties arising within the various national systems as regards the re-opening of proceedings, the Committee of Ministers has adopted Recommendation No. R (2000) 2. Information concerning the possibilities within the different national systems for re-examination or reopening of cases following judgments of the Court may be found on the website of the Council of Europe: <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/echr-system/implementation-and-execution-judgments/reopening-cases>.

234 These types of general measures are mentioned in Rule 6 of the Rules of the Committee of Ministers.

235 Annual Report 2007 of the Committee of Ministers regarding the Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, p. 16. Examples of general measures suggested or adopted by particular countries following a judgment by the Court may be found in this and the other Annual Reports of the Committee of Ministers, published by the Department of the Execution of Judgments of the ECtHR (<https://www.coe.int/en/web/execution/annual-reports>).

**supervision of the Committee of Ministers**, to which the State concerned must submit an “action plan” indicating the measures that it plans to take or that it has taken following a particular judgment of the Court. An “action report” is submitted when all measures have been taken. The supervision is concluded with the adoption by the Committee of Ministers of a final Resolution when all necessary measures have been executed<sup>236</sup>.

**The Court’s role** vis-à-vis the choice of the measures necessary to put an end to a violation and redress the effects thereof is **subsidiary**. In that respect, the Court has underlined that its competence under Article 41 to award sums by way of just satisfaction is meant to provide reparation solely for damage that cannot otherwise be remedied (*Scozzari and Giunta v. Italy*<sup>237</sup>).

In certain circumstances, however, the Court has moved on to indicate the type of measures to be adopted, namely in cases of systemic problems (for example, in the case of *Suljagić v. Bosnia and Herzegovina*<sup>238</sup>, which concerned the issue of foreign currency deposited before the dissolution of the Socialist Federal Republic of Yugoslavia, the Court explicitly stated which measures must be adopted: issuing government bonds and paying any outstanding instalments as well as default interest in the event of late payment within 6 months of the Court’s final judgment<sup>239</sup>. See also *Manushaqe Puto and Others v. Albania*<sup>240</sup>). In certain other cases, the Court has stressed that the nature of the violation does not even leave any choice as to the measures to be taken (for example, in *Assanidze v. Georgia*<sup>241</sup> the Court considered that in view of the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 the applicant’s release must be secured at the earliest possible date<sup>242</sup>)<sup>243</sup>.

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236 For an overview of the supervision process, see: <https://www.coe.int/en/web/execution/the-supervision-process>.

237 *Scozzari and Giunta v. Italy*, [Grand Chamber] judgment of 13 July 2000, no. 39221/98 and 41963/98, paras. 249-250.

238 *Suljagić v. Bosnia and Herzegovina*, judgment of 3 November 2009, no. 27912/02.

239 *Id.* para. 64.

240 *Manushaqe Puto and Others v. Albania*, judgment of 31 July 2012, nos. 604/07 and others.

241 *Assanidze v. Georgia*, [Grand Chamber] judgment of 8 April 2004, no. 71503/01.

242 *Id.* paras. 202-203.

243 See *Khodorkovskiy v. Russia*, judgment of 31 May 2011, no. 5829/04, para. 270, where the Court reiterated that it “will seek to indicate the type of measure that might be taken only exceptionally” and exemplified the types of cases that it has done so in the past.

### iii. The role of the ECtHR and the role of national courts after a final judgment

The Committee of Ministers is responsible for supervising the execution of the Court's judgments and for ensuring that the respondent State abides by the aforementioned obligations. The Court has the competence to deal with issues relating to the execution of a judgment only in the following cases:

- a) When the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment. In that case, it may refer the matter to the Court under **Article 46 § 3** for a ruling on the question of **interpretation**. This possibility was introduced with Protocol 14 and it has not been applied so far.
- b) If the Committee of Ministers considers that a State refuses to abide by a final judgment, it may bring **infringement proceedings under Article 46 § 4** referring to the Court the question whether that State has failed to fulfil its obligation under Article 46 § 1. This power of the Committee of Ministers was introduced with Protocol 14 and may be exercised only in exceptional circumstances. The procedure's mere existence, and the threat of using it, was expected to act as an effective new incentive to execute the Court's judgments<sup>244</sup>.

The Committee of Ministers exercised its power under this Article for the first time very recently, bringing infringement proceedings against Azerbaijan<sup>245</sup> for failing to abide by the Court's final judgment in the case of *Ilgar Mammadov v. Azerbaijan*<sup>246</sup>. The Committee of Ministers had previously called for the immediate and unconditional release of the applicant who is still in prison despite the Court's findings of fundamental flaws in the criminal proceedings.

Other than the above cases, the Court is not involved in the execution of its final judgments; as it has already been stressed, the supervision of their execution is the task of the Committee of Ministers. This does not mean, however, that the Court cannot ever deal with relevant new information in the context of **a fresh application**.

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244 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, paras. 99-100.

245 Interim Resolution CM/ResDH(2017)429, adopted on 5 December 2017.

246 *Ilgar Mammadov v. Azerbaijan*, judgment of 22 May 2014, no. 15172/13.

In particular, the Court has held that it is competent to examine complaints related to the non-execution of a particular judgment where there are facts that give rise to a fresh violation. For example, in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No 2)*<sup>247</sup> the Court held that the domestic court's refusal to re-open the proceedings and revise its judgment prohibiting the broadcasting of a commercial, which had already been found in breach of the Convention, was based on new grounds not previously examined in the Court's original judgment; the Court was thus able to examine the new application<sup>248</sup>.

Similarly, the Court has held that it has jurisdiction to examine complaints related to measures taken by a respondent State to remedy a violation found by the Court when these measures raise a new issue undecided by the original judgment. In *Mehemi v. France*<sup>249</sup>, the Court had held that the enforcement of an order for permanent exclusion of the applicant from French territory was a disproportionate interference with the exercise of his right to respect for his private and family life. In the subsequent *Mehemi v. France (no. 2)*<sup>250</sup>, although no new violation was found in the end, the Court asserted its jurisdiction to examine whether the State's measures vis-à-vis the applicant's immigration status taken following the Court's first judgment constituted a fresh violation<sup>251</sup>.

Based on the same argument, the Court has also held that, in the context of a continuing violation of a Convention right after a judgment by it, it may examine a second application concerning a violation of that right in a subsequent period of time. For example, in *Ivanțoc and Others v. Moldova and Russia*<sup>252</sup> the applicants had continued to be detained after the Court had found their detention unlawful and had asked the respondent State to secure their immediate release; their detention after the Court's original judgment was considered a fresh violation<sup>253</sup>.

In essence, the above means that until a final judgment is properly executed the State will continue to be found in violation of the Convention and be liable to pay just satisfaction.

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247 *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No 2)*, [Grand Chamber] judgment of 30 June 2009, no. 32772/02.

248 *Id.* paras. 64-68.

249 *Mehemi v. France*, judgment of 26 September 1997, no. 25017/94.

250 *Mehemi v. France (no. 2)*, judgment of 10 April 2003, no. 53470/99.

251 *Id.* paras. 43-44.

252 *Ivanțoc and Others v. Moldova and Russia*, judgment of 15 November 2011, no. 23687/05.

253 *Id.* paras. 91-93.

A limit has, however, been drawn very recently to such an approach when it comes to similar applications by different applicants complaining about a violation flowing from the same systemic problem that has not been addressed by the domestic authorities despite the deliverance by the Court of a pilot judgment. In *Burmych and Others v. Ukraine*<sup>254</sup>, the Court made clear that it would not continue to examine the numerous so called *Ivanov*-type applications<sup>255</sup>, which had been pending or which would in the future be submitted before it, in an accelerated, simplified summary procedure (limited to a statement of a violation and award of just satisfaction); this ran the risk of it becoming a mechanism for awarding compensation in substitution of the Ukrainian authorities contrary to the principle of subsidiarity<sup>256</sup>. It acknowledged the responsibility it shares with the States for realising the effective implementation of the Convention, but underlined that its “competence as defined by Article 19 of the Convention and its role under Article 46 of the Convention in the context of the pilot-judgment procedure do not extend to ensuring the implementation of its own judgments”<sup>257</sup>.

The above judgment is very recent and the extent to which it will alter the Court’s general approach to follow-up cases after a pilot-judgment remains to be seen<sup>258</sup>. What it is certain, however, with respect to any final judgment delivered by the Court is that the onus to properly execute it lies on the respondent State and its authorities. At this point, **the domestic courts have a crucial role to play**. This is particularly true in cases where the re-opening of proceedings is required, or in cases where the individual measures recommended by the Court require decisions of national courts (e.g. in parental visitation cases), or when domestic courts are called to apply and interpret new legislation adopted as a general measure following a judgment of the Court or when they need to adjust their jurisprudence following a judgment that finds the implementation of the existing legislation in breach of the Convention.

Equally important is the role of the domestic courts in ensuring that their own judgments are being implemented: delays or non-execution of a national court’s

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254 *Burmych and Others v. Ukraine* [Grand Chamber] judgment (struck out of the list) of 12 October 2017, nos. 46852/13, 47786/13, 54125/13, 56605/13 and 3653/14.

255 Cases raising issues similar to those assessed in the pilot judgment *Yuriy Nikolayevich Ivanov v. Ukraine*, judgment of 15 October 2009, no. 40450/04, which concerned prolonged non enforcement of domestic decisions in Ukraine.

256 *Burmych and Others v. Ukraine*, supra note 27, para. 155.

257 *Id.* para. 193.

258 After all, the Court did clearly state that it may reassess the situation within two years of the delivery of the judgment with a view to considering whether in the meantime there have occurred circumstances such as to justify examination of the applications that were struck out of the list with this decision (para. 223).

judgment may in itself constitute a violation of the Convention (see, for example, *Burmych and Others v. Ukraine*<sup>259</sup> mentioned above). In that respect, the Court has stressed that the right to a court would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party (*Hornsby v. Greece*<sup>260</sup>). The administrative authorities taken as a whole form one element of a State subject to the rule of law; thus, where the authorities refuse or fail to comply, or even delay doing so, with a domestic court's judgment, the State will be found in breach of Article 6 of the Convention (*Assanidze v. Georgia*,<sup>261</sup> also referencing *Hornsby v. Greece*).

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259 *Burmych and Others v. Ukraine* [Grand Chamber] judgment (struck out of the list) of 12 October 2017, nos. 46852/13, 47786/13, 54125/13, 56605/13 and 3653/14.

260 *Hornsby v. Greece*, judgment of 19 March 1997, no. 18357/91, para. 40.

261 *Assanidze v. Georgia*, [Grand Chamber] judgment of 8 April 2004, no. 71503/01, para. 183.

## Chapter 4

# Applying ECtHR case-law in domestic decision-making: principles and guidelines

The application of ECtHR case-law in domestic decision-making rests on the following factors:

- Incorporation of the Convention principles in the domestic legal order;
- Proper positioning of the Convention arguments in the domestic decision-making;
- Recognition and conceptualisation of the principle of subsidiarity and the margin of appreciation in practical reasoning.

These factors can be viewed as steps in the process of applying Convention law in the domestic legal order. Some of them are obligations or requirements on the national legislature, some are specific requirements addressed to the executive and all of them bear (at least some) relevance in the judicial decision-making in a particular case. In any event, these factors provide for a set of optimisation requirements with international human rights law making it possible for every domestic legal order to find its mode of compliance with the statutory and case-law enactments of that law.

### I. Incorporation of the Convention principles in the domestic legal order

There are different models or constitutional regimes of incorporation of the Convention law in domestic legal orders. In some legal systems, the position of Convention law follows the mode of incorporation of general international public law while some legal systems recognise the specific nature of the Convention as a “constitutional instrument of European public order in the field of human rights”.<sup>262</sup> Thus in every instance where Convention law is relevant to the domestic decision-making processes it is necessary to observe:

- the constitutional arrangement of incorporation of international law in the domestic legal order; and
- the (specific) position and nature of the Convention law within such an arrangement.

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262 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [Grand Chamber] judgment of 30 June 2005, no. 45036/98.

## i. The constitutional arrangement of incorporation of international law

### • Two general models: monist and dualist

Generally speaking, there are two traditional theories or modes of incorporation of international treaties in domestic legal orders: the monist and dualist theory. Depending on the theory adhered to; the domestic systems are commonly denoted as *monist* and *dualist* systems.<sup>263</sup>

**Monist systems** perceive the domestic and international law as two complementing *parts of a single system*. The state authorities and private parties are bound by domestic and international law. Moreover, the private parties may invoke their rights under international law and request the domestic authorities to honour their international legal undertakings.<sup>264</sup> In a monist system, the emphasis on the observance of international law is on the courts which can apply such law in the determination of a particular case directly.

In reality, the direct application of international law will depend on inter alia the following conditions:

- that the treaty in question has obtained binding force as such;
- that it has been accepted into national order through the relevant parliamentary processes (such as ratification); and
- that it has been made public as provided in national law.<sup>265</sup>

In a **dualist system**, international and domestic law are **two distinct legal orders**. International treaty obligations are a result of mutual understanding between sovereign states. Accordingly, legal rules adopted can produce legal effects only if the parliament of the state concerned transform them into national law. Therefore, national legislators hold supremacy and the state authorities and private parties are bound by international law to the extent to which it has been implemented in the domestic legal order. It also follows that the emphasis on the observance of international law is on the legislator.

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263 See further, A. Abashidze, “The Relationship between International Law and Municipal Law: Significance of Monism and Dualism Concepts”, in M. Novaković (ed.), *Basic Concepts of Public International Law* (PF, IUP, IMPP, Belgrade, 2013), pp. 23-33.

264 Provided, of course, that the international treaty in question is such that it provides for self-executing rules. On self-executing treaties see, for instance, L. Henry, “When Is a Treaty Self-Executing”, 27(7) *Michigan Law Review* (1929), pp. 776-785.

265 See further, European Commission for Democracy through Law (Venice Commission), *Comments on the implementation of international human rights treaties in domestic law and the role of courts* (CDL(2014)050), 2014.



- **Incorporation of international treaties in the legal order of the countries in the region**

All countries in the region have opted for a monist system; the respective constitutional provisions are included in the following table.

Country	Constitutional provision
<b>Albania</b>	<p><b>Constitution of the Republic of Albania</b>  <b>Article 122</b></p> <p>1. Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. The amendment, supplementation and repeal of laws approved by the majority of all members of the Assembly, for the effect of ratifying an international agreement, is done with the same majority.</p> <p>2. An international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it.</p> <p>3. The norms issued by an international organization have superiority, in case of conflict, on the laws of the country, when the agreement ratified by the Republic of Albania for its participation in this organization, expressly provide for the direct applicability of the norms issued by this organisation.</p>

<p><b>Bosnia and Herzegovina</b></p>	<p><b>The General Framework Agreement for Peace in Bosnia and Herzegovina</b></p> <p><b>Annex 4: Constitution of Bosnia and Herzegovina</b></p> <p><b>Article II: Human Rights and Fundamental Freedoms</b></p> <p>[...]</p> <p>2. International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.</p> <p>[...]</p> <p>4. Non-Discrimination. The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.</p> <p>[...]</p> <p>7. International Agreements. Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.</p> <p><b>Article III</b></p> <p>3. Law and Responsibilities of the Entities and the Institutions.</p> <p>[...]</p> <p>(b) [...] The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.</p>
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<b>Croatia</b>	<p><b>Constitution of the Republic of Croatia</b>  <b>Article 141</b>  International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.</p>
<b>Kosovo<sup>266</sup></b>	<p><b>Constitution of the Republic of Kosovo</b>  <b>Article 19 [Applicability of International Law]</b>  1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.  2. Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.</p>
<b>Macedonia</b>	<p><b>The Constitution of the Republic of Macedonia</b>  <b>Article 118</b>  International treaties that are ratified in accordance with the law constitute integral part of the domestic legal order and they could not be amended by law.  Article 2 (1) of the Courts Act  The courts adjudicate and ground their decisions and judgments on the basis of the Constitution, laws and international treaties which have been ratified in accordance with the Constitution.</p>

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266 Kosovo is not a party to the European Convention on Human Rights and is not therefore liable before the Court. The rights and freedoms guaranteed by the ECHR are, however, among the rights and freedoms expressly guaranteed by Article 22 of its Constitution, according to which they are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions. What is more, Article 53 [Interpretation of Human Rights Provisions] provides that "Human rights and fundamental

<b>Montenegro</b>	<p><b>Constitution of Montenegro</b></p> <p><b>Article 9</b></p> <p>The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation.</p>
<b>Serbia</b>	<p><b>Constitution of the Republic of Serbia</b></p> <p><b>International relations</b></p> <p><b>Article 16</b></p> <p>The foreign policy of the Republic of Serbia shall be based on generally accepted principles and rules of international law.</p> <p>Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.</p> <p>Ratified international treaties must be in accordance with the Constitution.</p>

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freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.

<p><b>Serbia</b></p>	<p><b>Direct implementation of guaranteed rights</b></p> <p><b>Article 18</b></p> <p>Human and minority rights guaranteed by the Constitution shall be implemented directly. The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws. The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right.</p> <p>Provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.</p>
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## ii. The specific position of Convention law in the domestic legal order

The specific position of Convention law in the domestic legal order is going to be examined in terms of two aspects: the specific position of the text of the Convention in the domestic legal framework and the “domestication” of the Court’s case-law, which are analysed under the following titles respectively: “the legal framework vis-à-vis human rights treaties: supremacy of the Convention or primacy of the Constitution” and “the nature of the Court’s case-law: *inter partes* legal effects but *de facto* obligations for all State parties”.

- **The legal framework vis-à-vis human rights treaties: supremacy of the Convention or primacy of the Constitution**

In the context of the traditional division of legal systems’ approach to the incorporation of international law, emphasis also needs to be placed, as already underlined above, on the manner of operation of Convention law in the domestic legal order. This is particularly true for cases where the Convention, as a human rights treaty, has a special position in the hierarchy of national norms. Such a special position is sometimes described as the *supremacy* of human rights treaties.<sup>267</sup>

A telling example of such **supremacy of the Convention** in the domestic legal order exists in the Constitution of **Bosnia and Herzegovina**.<sup>268</sup> Article II.1 of the Constitution provides that the State shall ensure the highest level of internationally recognised human rights and fundamental freedoms. Moreover, Article II.2 provides that the rights and freedoms set forth in the Convention and the Protocols thereto shall apply directly in Bosnia and Herzegovina, and that these shall have priority over all other law. It follows from these provisions that the Convention is above all legal norms of national and domestically incorporated international law. Some authors have also suggested that it is above the Constitution itself but the Constitutional Court was not ready to recognise such supremacy of the Convention in the domestic legal order. In any event, in the legal system of Bosnia and Herzegovina, in accordance with the principle of supremacy, the Convention norms are placed at the rank of constitutional principles governing the overall functioning of the domestic legal order.<sup>269</sup>

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267 See further, Venice Commission, *Draft report on case-law regarding the supremacy of international human rights treaties* CDL-DI(2004)005rev, 2004.

268 Constitution of Bosnia and Herzegovina (1995), with further amendments.

269 See further, M. Ćeman, *Constitutional Justice: Doctrine and Case-Law of the Constitutional Court of Bosnia and Herzegovina* (VII International Legal Forum, Saint Petersburg, Russia) 2017; A. Murtezić, “Relation between European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Constitution of Bosnia and Herzegovina”, 7(13) *Human Rights Review* (2017), pp. 27-47.

Another specific example of incorporation of the Convention law in the domestic legal order can be observed in the case of **Serbia**. In fact, the general positioning of the Convention in the domestic legal order is rather standard. There is no explicit mention of the Convention in the Serbian Constitution<sup>270</sup> and the Constitution accepts the classic monist theory of incorporation of international treaties. Pursuant to Article 16(2) of the Constitution all ratified international treaties, which accordingly applies to the Convention, must be in accordance with the Constitution. At the same time, pursuant to Article 194(5) of the Constitution all domestic law shall not be contrary to the ratified international treaties and generally accepted rules of the international law. Thus, similarly to other monist systems that preserve the principle of **primacy of the Constitution**, the hierarchy of domestic norms is set in the following order:

1. Constitution;
2. international law;
3. laws and other parliamentary enactments;
4. other legal norms of lower order (by-laws; decrees).

What makes the Serbian constitutional positioning of international law, including the Convention, specific is the explicit reference in the Constitution to the binding nature of the practice of international institutions which supervise the implementation of international human rights treaties in all domestic decisions concerning human rights.<sup>271</sup> The domestic authorities are therefore reminded in the Constitution, as the legal source of the highest order, that the relevant norms of international human rights law are not only a set of provisions set out in international agreements but also the implicit and often subtle principles of human rights protection flowing from those provisions. In the Convention context, this means that the domestic authorities are prompted to understand and apply the Convention law as interpreted and applied by the Court in its case-law in all matters concerning human rights that fall within their relevant jurisdictions.

It is important to stress that this constitutional enactment found in the Serbian legal order, although important for the sake of prominence given to the Court's case-law, remains essentially of a limited legal importance as the domestic authorities would, in any event, be obliged to apply the Convention norms in the manner interpreted by the Court. In fact, it is through the Court's case-law that the Convention norms are given their proper meaning and the full implementation of the Convention in the domestic legal order cannot be achieved without the diligent observance of the principles flowing from the Court's case-law, as will be explained further below.

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270 Constitution of the Republic of Serbia (2006).

271 Article 18(3) of the Constitution.

- **The nature of the Court’s case-law: *inter partes* legal effects but *de facto* obligations for all State parties**

On a theoretical level, the importance of the Court’s case-law for the implementation of the European human rights standards in the domestic legal orders of the Council of Europe Member States can be observed through the following formula of “domestication” of international human rights treaties consisting of four progressive steps:<sup>272</sup>

1. Interaction: the relevant actor provokes<sup>273</sup> an interaction or series of interactions (Convention disputes) with another<sup>274</sup> in a law-declaring forum (the Court);
2. Interpretation or enunciation of the applicable (Convention) norm(s) is prompted by the fact that there is an interaction (dispute);
3. Internalisation: the action of the moving party coerces the other party to respect the legal norm as interpreted by the law-declaring forum and to accept the new interpretation of the international norm into its internal normative system;
4. Obedience: the respondent party’s perception of a mandatory nature of the new interpretation of the norm in its domestic legal order.

Similar conceptualisation of the nature and importance of the Court’s case-law flows from the following principle set by the Court itself:

“The Court reiterates at the outset that it has a double role in respect of applications lodged under Article 34 of the Convention: **(i) to render justice in individual cases** by way of recognising violations of an injured party’s rights and freedoms under the Convention and Protocols thereto and, if necessary, by way of affording just satisfaction and **(ii) to elucidate, safeguard and develop the rules instituted in the Convention**, thereby contributing in those ways to the observance by the States of the engagements undertaken by them as Contracting Parties.” (emphasis added)<sup>275</sup>

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272 See further, H. Hongju Koh, “How is International Human Rights Law Enforced?”, 74(4) *Indiana Law Journal* (1999), p. 1414. Note that this is an adapted Koh’s theory.

273 An individual applicant or a Member State.

274 The respondent State.

275 *Nagmetov v. Russia* [Grand Chamber] judgment of 30 March 2017, no. 35589/08, para. 64.



In this connection, it is also important to understand the nature of the Court's case-law. In theory, the Court's judgments and decisions have only *inter partes effects* which means that they do not create legal obligations beyond the respondent state(s) to the dispute and beyond the particular facts of the case. Moreover, the Court is not strictly bound by its previous interpretation of the Convention which means that the doctrine of "binding precedent" known to the common law does not apply to its case-law.<sup>276</sup>

However, the Court has itself stressed that only in exceptional circumstances, in the case of a good and cogent reason, will it depart from its previous interpretation of the Convention,<sup>277</sup> which is an expression of the principle of legal certainty in the Court's practice. In practical terms, this means that the Court's interpretation of the Convention creates a predictable set of obligations for the states that apply beyond the particular parties and circumstances of a case. The domestic authorities are therefore required to follow and apply the Court's case-law in respect of other states as that case-law gives clearer meaning to the particular Convention norms and thus creates *de facto obligations for all state parties* to the Convention.

Lastly, in the context of the incorporation of Convention principles in the domestic legal order, it is important to stress the following principle from the Court's case-law:

"Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement'."<sup>278</sup>

In other words, when confronted with a Convention issue, and **irrespective of the particular mode or system of incorporation of international law in the domestic legal order, the national authorities are obliged to observe the specific nature of the Convention obligations** in order to meet their commitments under the Convention.

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276 D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2014), p. 20.

277 *Sabri Güneş v. Turkey* [Grand Chamber], judgment of 29 June 2012, no. 27396/06, para. 50.

278 *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, para. 239.

## **II. Proper positioning of the Convention arguments in the domestic decision-making**

The proper positioning of the Convention arguments in the domestic judicial decision-making depends on an awareness of the essential nature of the following elements or steps:

1. identification of a Convention issue in the case under examination;
2. identification of the applicable Convention norm and the relevant Court's case-law;
3. resolution of the Convention issue at the appropriate stage of the proceedings; and
4. correct and complete application of the Convention law.

### **Step 1: Identification of a Convention issue in the case under examination**

The identification of a Convention issue in a particular case primarily presupposes knowledge of the Convention law. It also necessitates a comprehensive and meaningful research of the relevant sources of that law. In this connection, the primary source to be consulted is the Court's official database of judgments and decisions HUDOC.<sup>279</sup> In addition, the Court's Reports of Judgments and Decisions provide for a comprehensive overview of the most important judgments and decisions adopted by the Court.<sup>280</sup>

The available summaries and analyses of the case-law, including various handbooks and commentaries, should also be consulted as sources of information about the Convention law. The AIRE Centre's Legal Bulletin, published quarterly in English and BCMS, carries summaries of and expert commentaries on selected recent decisions of the European Court of Human Rights and of the Court of Justice of the European Union, focusing on cases most relevant to the countries of the Western Balkans. Each Bulletin also features an article unpicking a particular issue related to the implementation of human rights law<sup>281</sup>. In some jurisdictions, the Court's rulings concerning that State are also published in the official gazette in the national language which may facilitate access to Convention law. To the same end, the European Human Rights database has been providing access to the jurisprudence of the Court in Bosnian/Croatian/Montenegrin/Serbian (BCMS), Albanian and Macedonian since 2014<sup>282</sup>.

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279 Available at [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

280 Available at the Court's website [www.echr.coe.int](http://www.echr.coe.int).

281 Available through a searchable database on the following website: <http://www.airecentre.org/legal-bulletins.php>.

282 Available at [www.ehrdatabase.org](http://www.ehrdatabase.org).

Very often in practice the identification of a Convention issue in a particular case is an intellectual process dependent on the personal knowledge of a judge or other legal officer working on the case. In some instances, this identification of a Convention issue may follow from their personal knowledge and in some instances it may be the result of a research based on an argument raised by the parties. In each case, there is a wide area of a potentially erroneous and/or incomplete processing of a Convention issue if its identification remains dependent on the individual initiative of either the advocate or the judge.

It is therefore advisable for the domestic authorities, notably the courts, to put in place a system which will be able to identify that the case under examination gives rise to a Convention issue and which will have pre-prepared protocols for its further processing. This may be achieved by the establishment of specialised departments dealing with the research and advice on the Convention (and other international) law or putting in place the relevant administrative protocols for the processing of “Convention cases” within the existing structures of the case-law departments in the courts and other state authorities.

## **Step 2: Identification of the applicable Convention norm and the Court’s case-law**

- **Determining the applicable Convention provision through the identification of the relevant Court case-law**

Following the identification of the case as a “Convention case”, it is necessary to determine under which Convention provision the matter complained of falls. In some cases this will be obvious and in other cases an answer may follow only after a considered analogous conceptualisation of existing Convention law. That will be the case where there is no directly applicable case-law of the Court resolving the issue under consideration. In such instances, it is particularly important to explain in detail what has led the decision-maker to reach the given decision on a particular scope of protection of the invoked or applied Convention norm. Such a requirement follows from the guarantee of an adequate reasoning implicit in the very concept of due process. It is also an indication of the observance of the rule of law and the avoidance of arbitrary power in the administration of law.<sup>283</sup>

The elucidation of the Convention norms is achieved through the case-law of the Court. Thus, a mere reference to the Convention norm without a reference to the relevant Court’s case-law will very rarely be sufficient. The Court itself has stressed

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283 *Lhermitte v. Belgium* [Grand Chamber], judgment of 29 November 2016, no. 34238/09, para. 67.

that “what matters is the reality of the situation rather than appearances, a mere reference to [a Convention] Article in the domestic decisions is not sufficient; the case must have in fact been examined consistently with the standards flowing from the Court’s case-law.”<sup>284</sup>

The citation of a Convention norm without reliance on the Court’s case-law may also lead to a potentially incorrect outcome as the text of the Convention norms is very broad and often on the face of it very broad. However, the real meaning of the norm as determined by the Court in its case-law may be limited and very precise. An example in this respect is the provision of Article 5 § 1 of the Convention which guarantees “the right to liberty and security of person”. On the face of it this provision may be considered as covering various aspects of personal security.<sup>285</sup> However, the Court has interpreted it narrowly stressing that the phrase “security of the person” must be understood in the context of physical liberty rather than physical safety and that the inclusion of the word “security” simply serves to emphasise the requirement that detention may not be arbitrary.<sup>286</sup>

In this context, it is crucially important to be mindful of **the autonomous meaning of the Convention terms** (such as “criminal charge”<sup>287</sup> and “civil rights and obligations”<sup>288</sup>),<sup>289</sup> which may necessitate an analysis of applicability or inapplicability of the autonomous concept in question in the case under examination. These are further discussed in Chapter 2 of this publication.

- **Considerations when navigating through the Court’s case-law**

(i) In the event of multiple relevant authorities of the Court’s case-law, the preference should be given to the case against **the country concerned** and, in the absence of such a case, to the Court’s practice concerning **countries with similar legal orders**. If the case-law concerning a country with a structurally and conceptually different arrangement of the legal order is used, it is necessary to set the divergences out transparently and to explain why that case-law may nevertheless be applicable in the

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284 *Neshkov and Others v. Bulgaria*, judgment of 27 January 2015, nos. 36925/10 and 5 others, para. 187.

285 See, for instance, Human Rights Committee, *Delegado Páez v. Colombia*, no. 195/85, 12 July 1990 (Article 9 § 1 of the International Covenant on Civil and Political Rights).

286 *Hajduová v. Slovakia*, judgment of 30 November 2010, no. 2660/03, para. 54. See also Chapter 2 of this publication on Key Concepts of the Convention.

287 *A and B v. Norway* [Grand Chamber], judgment of 15 November 2016., nos. 24130/11 and 29758/11, paras. 105-107.

288 *Ferrazzini v. Italy* [Grand Chamber], judgment of 12 July 2001, no. 44759/98, paras. 23-31.

289 See Chapter 2.VI above for a brief analysis of the most important autonomous concepts of the Convention.

case under examination. In any event, an automatic transposition of the Convention law to a substantially different legal situation will very often lead to a misconceived and erroneous outcome.

(ii) The **case-law of the Grand Chamber** must be given priority over all other case-law of the Court. The Grand Chamber case-law is followed by the case-law adopted at the Chamber level. The practice of the Committees of three judges, which are dealing only with the well-established case-law of the Court,<sup>290</sup> is of a limited relevance as the Committees should simply apply rather than develop the Court's case-law. The jurisprudential authority thus lies in the Grand Chamber or the Chamber judgments establishing the relevant principle and their application to a set of facts and not in the Committee cases simply applying those principle in subsequent cases raising the same legal issues.

(iii) More **recent cases** should be given precedence over the older cases. Moreover, the **level of importance of a judgment as indicated in HUDOC** should be noted. In particular, the cases marked with the first level of importance (high importance), which made a significant contribution to the case-law, should always be consulted. The further, second level (medium importance), are cases which, although not making a significant contribution to the case-law, go beyond merely applying the existing case-law. The cases of the third level (low importance) are those that simply apply the existing case-law and they are usually of a limited importance for the development of the domestic practice on the basis of the Court's case-law.<sup>291</sup>

(iv) Lastly, in the use of the Court's case-law, it is important to observe that only final cases are used as an authority in the decision-making. In this connection, it is important to differentiate the finality of a decision and a judgment.<sup>292</sup> A decision cannot be referred to the Grand Chamber and it thus becomes final upon its adoption. The judgments become final: (1) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (2) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (3) when the panel of the Grand Chamber rejects the request to refer the case to its jurisdiction.<sup>293</sup> The finality is always indicated in HUDOC.

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290 Article 28 of the Convention.

291 See further [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

292 See further on this in Chapter 3 of this publication.

293 Article 44 § 2 of the Convention.

### **Step 3: Resolution of the Convention issue at the appropriate stage of the proceedings: a preliminary issue and/or the merits of the case**

The third step in the process of proper positioning of Convention arguments in the domestic judicial decision-making, following the identification of the Convention issue raised in the case and the elucidation of the applicable Convention law for the resolution of the case, is the determination of the appropriate stage of the proceedings at which that Convention issue must be resolved. Two situations may be differentiated in this context.

First, a Convention issue may arise with regard to a **preliminary issue in the case**.<sup>294</sup> In such instances, a further determination of the merits of the case, without the resolution of the preliminary issue, may be impossible or lead to an erroneous outcome. Thus, as a rule, before proceeding with a further step in the determination of the merits of the case, the preliminary issue will have to be addressed and resolved.

Second, a Convention issue may arise in the context of **the merits of the case**.<sup>295</sup> without any implications for the preliminary issues in the case. In these instances, the further steps in the examination of the merits of the case will be possible without the introduction of the Convention arguments already at the preliminary stage of the proceedings.

The difficult cases in this context are those where it is **impossible to draw a clear distinction** between a preliminary issue and a matter on the merits from the Convention point of view. Moreover, in some cases the decision on the preliminary issue will so closely be linked to the decision on the merits that it will be impossible to separate them. For instance, an issue may arise as to the question whether an individual has a legally protected legitimate property expectation amounting to a “possession” within the meaning of Article 1 of Protocol No. 1. At the same time, in case of a denial of such a property claim by a domestic authority, an issue will arise whether such a denial is in compliance with the property protection guaranteed under that provision. Thus, the preliminary issue (the existence of a “possession”) and the issue on the merits (denial of protection of the property claim) will inextricably be linked together that it will be impossible to separate them. This conceptual perplexity was explained in the Court’s case-law in the following manner:

“A negative answer to [the question of the existence of legitimate property expectations] will consequently lead the Court to a finding that the [denial of the property claim] did not amount to an interference with

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294 For instance, an issue of admissibility of evidence allegedly obtained in breach of the rights protected under the Convention.

295 For instance, as a question of the justification of restriction on the freedom of expression in a defamation case.

[the] property rights under Article 1 of Protocol No. 1 given that the applicant would not have a proprietary interest falling within Article 1 of Protocol No. 1 ...

However, by contrast, if the Court finds that the applicant satisfied the requirements as set out by the relevant ... legislation, then the [denial of the property claim] will be regarded as an interference with the applicant's property interests which was not in accordance with the law as required under the Convention. Such a conclusion will make it unnecessary for the Court to ascertain whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights in finding a violation of Article 1 of Protocol No.1 ..."<sup>296</sup>

In these cases the preliminary issue will have to be joined to the examination of the merits of the case and resolved at the same time. For the purpose of transparency and clarity in the analysis a clear indication of a postponement of the Convention analysis for a later stage in the reasoning will have to be made. Moreover, at the moment of the determination of the matter, an explicit cross-reference to the earlier deferment of the decision should be made. A similar method is employed by the Court in its examination of cases giving rise to the conceptual perplexity at issue. In such cases, the Court joins the assessment on the admissibility of an application to its assessment of the merits of the case. It thereby makes an explicit decision to join the assessment of admissibility to the merits and to reject or uphold the admissibility objection.<sup>297</sup>

#### **Step 4: Correct and complete application of the Convention law**

With regard to the last element in the above-indicated four-step test to the proper positioning of the Convention arguments in the domestic judicial decision-making, namely the requirement of a correct and complete application of the Convention law, it is salutary to reiterate that whenever a Convention issue arises in a case, the domestic courts should be mindful that “[when] pleas deal with the ‘rights and freedoms’ guaranteed by the Convention and the Protocols thereto, the national courts are required to examine them with particular rigour and care.”<sup>298</sup> This “particular rigour and care” may also be determined as a “correct and complete” application of the Convention law.

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<sup>296</sup> *Damjanac v. Croatia*, judgment of 24 October 2013, no. 52943/10, paras. 88 and 89.

<sup>297</sup> For instance, *Petrović v. Serbia*, judgment of 15 July 2014, no. 40485/08, paras. 65 and 98.

<sup>298</sup> *Wagner and J.M.W.L. v. Luxembourg*, judgment of 28 June 2007, no. 76240/01, para. 96.

- “Correctness”

(i) The correctness in the application of the Convention law means that the use of the particular case-law in the domestic decision-making must be made with **due regard to the legal context and the factual and legal background** in which it developed. A common fallacy that arises in this context concerns the transposition of the principles developed in a particular legal and factual context to a conceptually different legal situation. This is usually the result of the reading and use of a particular wording of a judgment or decision out of its legal context and the overall understanding of the principle which that wording expresses. The avoidance of this fallacy should rigorously be observed,

(ii) Another aspect of the requirement of “correctness” is a **precision in the citation**. This requires that the sources used in the analysis must be verified and properly referenced so that, if need be, they are easily identifiable. In particular, a reference to the Convention principles should always be made by setting out the name of the case in which those principles have developed, the source consulted and the relevant paragraph(s) number(s) in the judgment or decision which contain(s) the principle relied upon in the decision-making. A mere reference made to the name of a case is not a proper and complete citation of a judgment or decision used for the resolution of a particular legal matter.

- “Completeness”

There are two principle aspects of the requirement of “completeness” in the application of the Convention law. First concerns the question of internal consistency and harmony of the Convention law and the second concerns the harmony of the Convention law with other sources of international law.

(i) With regard to the first aspect of completeness, the Court has stressed that “the Convention must be read as a whole, and interpreted in such a way as to promote **internal consistency and harmony** between its various provisions.”<sup>299</sup> Thus, for instance, in the matters concerning the effects of educational practices on the religious beliefs of an individual, the right to respect for freedom of religion under Article 9 of the Convention will have to be read in accordance with the principles developed under the right to education guaranteed in Article 2 of Protocol No 1, irrespective of the fact that this latter provision itself may not be directly applicable.<sup>300</sup>

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299 *Catan and Others v. Moldova and Russia* [Grand Chamber], judgment of 19 October 2012, nos. 43370/04 and others, para. 136.

300 See, for instance, *Osmanoğlu and Kocabaş v. Switzerland*, judgment of 10 January 2017, no. 29086/12, para. 90.



(ii) As to the second aspect of the requirement of completeness of the application of the Convention law, the Court has held that the Convention should always be interpreted and applied in a manner which secures **harmony with other sources of international law** of which it forms part.<sup>301</sup> An example in this respect concerns the interpretation and application of the right to respect for family life under Article 8 of the Convention in the transnational child custody cases in accordance with international law on the civil aspects of international abduction of children.<sup>302</sup>

In both aspects of completeness of the application of the Convention law, the domestic decision-maker should adequately be informed and attentive to the Convention law read as a whole and to various sources of international law on the legal matter under examination. This presupposes adequate knowledge and understanding of the relevant legal sources and their diligent and proper application in the decision-making processes.

### **III. Recognition and conceptualisation of the principle of subsidiarity and the margin of appreciation in practical reasoning**

#### **i. Subsidiarity: Cooperation in securing effective enforcement of human rights protection**

The concept of subsidiarity is gaining significant prominence in the arrangement of relations between the national and international jurisdictions on the matter of effective enforcement of human rights protection.<sup>303</sup> In such an arrangement, the protection guaranteed at the national level is intended to be of a primary order and the protection at international level secondary. Moreover, the national authorities enjoy a certain margin of appreciation in their securing of rights guaranteed under the Convention and the Court cannot intervene in their judgment if they have not overstepped that margin of appreciation.<sup>304</sup>

It is salutary to reiterate that the concept of subsidiarity is essentially about the obligation on states to apply Convention standards correctly and effectively. It does not presuppose an unfettered and unconditional deference to the domestic authorities to enforce the internationally recognised standards of human rights protection. The limits of such deference can be explained in the following manner:

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301 *Al-Adsani v. the United Kingdom* [Grand Chamber], judgment of 21 November 2001, no. 35763/97, para. 55.

302 See, for instance, *X v. Latvia* [Grand Chamber], judgment of 26 November 2013, no. 27853/09, paras. 92-108.

303 See further, R. Spano, "Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity", 14(3) *Human Rights Law Review* (2014), pp. 487-502.

304 See further on the concepts of subsidiarity and margin of appreciation, *supra* Chapter 2.V.

“[T]he assertion of subsidiarity cannot be viewed as a simple equation of primacy but rather as a resultant of the harmonisation of relevant standards at the level of national and international jurisdictions. In other words, subsidiarity should be viewed as a complex interplay of confidence, responsibility and assistance in securing expansive human rights protection. There is, therefore, a close correlation between subsidiarity and the necessity of effective implementation of international human rights standards in the domestic legal systems.”<sup>305</sup>

## ii. Key legal concepts that reflect the principle of subsidiarity

In practical reasoning this complex interplay of national and international administration of justice expressed through the concept of subsidiarity is principally reflected in the following legal concepts:

- exhaustion of domestic remedies;
  - factual findings of the domestic courts;
  - interpretation of national law;
  - decision-making within the designated margin of appreciation.
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- **Exhaustion of domestic remedies: an opportunity to resolve the problems domestically**

The requirement of exhaustion of domestic remedies is a keystone of the principle of subsidiarity. It rests on the complementarity between the requirements of Articles 13 and 35 § 1 of the Convention. Under **Article 13** of the Convention the domestic system is obliged to provide for effective remedies capable of addressing and redressing an individual's Convention grievances. At the same time, under **Article 35 § 1** of the Convention, every individual who wishes to invoke his or her Convention rights at the international level is obliged to exhaust such remedies and thereby allow the national authorities to address (and redress) his or her Convention grievances before they can be raised at the international level.

This complementarity, underlining the principle of subsidiarity, is explained in the following manner in the Court's case-law:

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305 A. Uzun Marinković and K. Kamber, *Fostering Domestication of Human Rights through the Exhaustion of Domestic Remedies: A Lesson Learned from the ECtHR Pilot and Leading Judgment Procedures*, 2 *Inter-American and European Human Rights Journal* (2016), p. 336.

“It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. **The rule of exhaustion of domestic remedies is based on the assumption** – reflected in Article 13 of the Convention, with which it has close affinity – **that there is an effective remedy available in respect of the alleged violation** (emphasis added). The rule is therefore an indispensable part of the functioning of this system of protection.

...

It is the Convention complaint which must have been aired at national level for there to have been exhaustion of “effective remedies”. It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument ...”<sup>306</sup>

The requirement of exhaustion of domestic remedies is essentially **to the benefit of the domestic authorities** as they are given a possibility to remedy the situation complained of and thus to forestall the finding of a violation of the Convention at international level. It is also **to the benefit of the individual** concerned as the resolution of the case at the domestic level provides for a more efficient and usually more effective manner of protection of individual rights. The rule of exhaustion of domestic remedies must therefore be taken seriously by all the relevant stakeholders in the process of achieving an effective human rights protection under the Convention.

- **Factual findings of the domestic courts**

When the domestic authorities are called upon to determine a human rights issue, the Court will usually give deference to the establishment of the relevant facts and in particular to their interpretation of national law made by the domestic courts.

In this connection, with regard to the findings of fact in particular, the Court has stressed that although it is not bound by the findings of domestic courts and

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306 *Vučković and Others v. Serbia* (preliminary objection) [Grand Chamber], judgment of 25 March 2014, nos. 17153/11 and 29 others, paras. 69 and 75.

remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts.<sup>307</sup>

This does not mean, however, that the Court will uncritically accept any finding of fact reached by the domestic courts. **As a rule, the Court will not intervene in the domestic authorities' assessment of the relevant facts in so far as their reasoning in this respect is not arbitrary or manifestly unreasonable.**<sup>308</sup> The Court has also explained that it cannot rely blindly on the decisions of the domestic authorities, especially when they are obviously inconsistent or contradict each other. In such a situation the Court has to assess the evidence available to it in its entirety and reach its own conclusion of fact.<sup>309</sup>

Moreover, some allegations of a breach of the Convention rights, such as the right to life under Article 2, will require a more stringent assessment by the Court of the factual situation established by the domestic courts, particularly where there is an allegation of the lack of an effective investigation. In particular, the Court has held that “[i]n the light of the importance of the protection afforded by Article 2, the Court must subject complaints of loss of life to the most careful scrutiny, taking into consideration all relevant circumstances”.<sup>310</sup>

Similarly, the very nature of some Convention complaints will require the Court to examine whether all relevant facts have been established in an acceptable manner from the Convention point of view and whether the application of law to those facts is in compliance with the Convention requirements. A telling example in this respect is the protection of the freedom of speech under Article 10 where the Court has held the following:

“The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’

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307 *Giuliani and Gaggio v. Italy* [Grand Chamber], judgment of 24 March 2011, no. 23458/02, para.180.

308 *Bochan v. Ukraine (No. 2)* [Grand Chamber], judgment of 5 February 2015, no. 22251/08, para. 61.

309 *Dzemyuk v. Ukraine*, judgment of 4 September 2014, no. 42488/02, para. 80.

310 *Banel v. Lithuania*, judgment of 18 June 2013, no. 14326/11, para. 67.

and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’ ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...”<sup>311</sup>

- **Interpretation of national law primarily by the domestic courts**

With regard to the interpretation of national law, the Court has often stressed that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law.<sup>312</sup> The Court’s powers in this respect are very limited. They have been determined in the following manner:

“The Court recalls that it is primarily for the national authorities, in particular the courts, to resolve problems of interpretation of domestic legislation. **The Court’s role is limited to verifying whether the effects of such interpretation are compatible with the Convention** (emphasis added). That being so, save in the event of evident arbitrariness, it is not for the Court to question the interpretation of the domestic law by the national courts ... Thus, where the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction ..., on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law ...”<sup>313</sup>

It should be noted from these principles that the subsidiarity, in the form of deference to the domestic courts’ interpretation of national law, is not unfettered and, in order for it to come into force, a serious and diligent approach by the domestic courts needs to be demonstrated. In other words, the decisions of the domestic courts should be **free from any indication of arbitrariness**. Arbitrariness in this context can be understood as a lack of any reasons for the decision or if the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a denial of justice.<sup>314</sup>

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311 *Morice v. France* [Grand Chamber], judgment of 23 April 2015, no. 29369/10, para. 124.

312 *Karácsony and Others v. Hungary* [Grand Chamber], judgment of 17 May 2016, nos. 42461/13 and 44357/13, para. 123.

313 *Károly Nagy v. Hungary* [Grand Chamber], judgment of 14 September 2017, no. 56665/09, para. 62.

314 *Moreira Ferreira v. Portugal* (no. 2) [Grand Chamber], judgment of 11 July 2017, no. 19867/12, para. 85.

Moreover, in principle **the Court has no power to review the domestic legislation in the abstract**. It has explained that in proceedings originating in an individual application, it is not called upon to review the legislation at issue in the abstract but has to confine itself, as far as possible, to an examination of its application to the concrete case before it.<sup>315</sup>

In some instances, however, in order for the Court to ascertain whether the interference complained of was “in accordance with the law”<sup>316</sup>, it will necessarily have to engage in some degree of abstraction and examine whether the applicable domestic law as such complied with the fundamental principle of the rule of law.<sup>317</sup> A telling example in this context concerns complaints of unlawful secret surveillance where the Court will inevitably need to examine the domestic legislative arrangement allowing for such an interference with the right to respect for private life and confidentiality of correspondence guaranteed under Article 8 of the Convention before examining its effects in the particular case under examination.

Similarly, some Convention provisions by their very nature require the Court to engage in the interpretation of domestic law. This concerns, for instance, Article 5 § 1 of the Convention which provides that any deprivation of liberty of an individual must be lawful, namely in accordance with the substantive and procedural provisions of domestic law. In such instances, the Court as stressed that:

“While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. This applies, in particular, to cases in which Article 5 § 1 of the Convention is at stake and the Court must then exercise a certain power to review whether national law has been observed ...”<sup>318</sup>

- **Decision-making within the designated margin of appreciation**

Lastly, the expression of subsidiarity through the domestic authorities’ power to determine the matters in dispute within the scope of their margin of appreciation is a well-enshrined principle in the Court’s case-law. In particular, the Court has often stressed that when exercising its supervisory function, its task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether

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315 *Travaš v. Croatia*, judgment of 4 October 2016, no. 75581/13, para. 83.

316 See above Chapter 2.VI.ii under the concept of “quality of law”.

317 *Dragojević v. Croatia*, judgment of 15 January 2015, no. 68955/11, para. 86.

318 *Creangă v. Romania* [Grand Chamber], judgment of 23 February 2012, no. 29226/03, para. 101.

the decisions they have taken pursuant to their power of appreciation are compatible with the Convention.<sup>319</sup> Accordingly, **if the domestic authorities have relied on the Court's case-law determining the scope of the margin of appreciation in a particular case and carefully applied all the relevant principles of that case-law, the Court is unlikely to find the possibility to intervene in their decision on the merits of the case provided that it remained within that designated margin.**

### Conclusion

The above-indicated factors can be used as guiding principles in the application of the Convention law at the domestic level. They are, however, only general indications of an appropriate process of application of the Convention law at the national level. They do not provide any substantive solutions for the resolution of a case nor do they guarantee a substantive validity of the outcome.

Nevertheless, presupposing that the substantive Convention law is known to the relevant decision-maker, the level of observance of these factors in a particular case can proportionately determine the level of compliance with the Convention law as they allow for a proper transposition of that law in the domestic courts' judgments and decisions. In other words, an assumption can be made that the higher level of observance of these factors will lead to a higher level of compliance with the Convention law. It is therefore hoped that the domestic courts will seek to rely on these guiding principles in order to secure an effective compliance with the Convention law.

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319 See, for instance, *Von Hannover v. Germany* (no. 2) [Grand Chamber], judgment of 7 February 2012, nos. 40660/08 and 60641/08, para. 105.

## About the AIRE Centre

The AIRE Centre is a non-governmental organisation that promotes awareness of European law rights and provides support for victims of human rights violations. A team of international lawyers provides information, support and advice on European Union and Council of Europe legal standards. It has particular experience in litigation before the European Court of Human Rights in Strasbourg and has participated in over 150 cases. Over the last 20 years the AIRE Centre has conducted and participated in a number of seminars in Central and Eastern Europe for the benefit of lawyers, judges, government officials and non-governmental organisations.

The AIRE Centre has been focusing on the countries of Western Balkans in particular, where it has been for over decade and a half conducting a series of long-term rule of law programmes in partnership with domestic institutions and courts. Our aim throughout these programmes has been to promote the national implementation of the European Convention on Human Rights, assist the process of European integration by strengthening the rule of law and full recognition of human rights, and encourage regional cooperation amongst judges and legal professionals.



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